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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 352.

SAMUEL H. SHEPPARD,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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his family, for the purpose of inflaming the entire community against petitioner and of prejudicing him in the thoughts and minds of every resident of the community, all of which produced a tremendous pressure for his arrest and conviction and resulted in the creation of such an atmosphere of hysteria and prejudice and of a climate of public opinion so adverse to petitioner as to make the trial a mere legal device for registering the verdict already dictated by the news media and by the public opinion which they had generated ---------- 17

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No. _____.

SAMUEL H. SHEPPARD,

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vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Samuel H. Sheppard, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Ohio, entered in this case, affirming a judgment of the Ohio Court of Appeals, Eighth Judicial District, which judgment affirmed the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, whereby Petitioner was convicted of Second Degree Murder and sentenced to the Ohio State Penitentiary for life.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Cuyahoga County, Ohio, overruling Petitioner's motion for a new trial, printed in Appendix A hereof, p. 1, is unreported.

The opinion of the Ohio Court of Appeals, Eighth Judicial District, affirming the judgment of the Court of

Common Pleas of Cuyahoga County, Ohio, printed in Appendix A, p. 18, is unreported.

The majority opinion of the Supreme Court of Ohio affirming the judgment of the Court of Appeals in a divided decision (five to two), printed in Appendix A hereof, p. 84, is reported in 165 Ohio St. 293.

The dissenting opinion by Judge Taft, concurred in by Judge Hart, printed in Appendix A, p. 95, is reported in 165 Ohio St. 302.

STATEMENT OF JURISDICTION.

1. The petitioner was convicted, after a jury trial, in the Court of Common Pleas of Cuyahoga County, Ohio, on December 21, 1954, of murder in the second degree, with penalty fixed at imprisonment for life in the Ohio State Penitentiary.

2. The conviction was appealed to the Ohio Court of Appeals, Eighth Judicial District, which court affirmed the judgment of the Common Pleas Court.

3. The judgment of the Supreme Court of the State of Ohio sought to be reviewed was entered on May 31, 1956, Appendix A, p. 109. A petition for a rehearing of said judgment was denied July 5, 1956, Appendix A, p. 109.

4. The jurisdiction of this Court is invoked under Title 28, United States Code, Annotated, Section 1257 (3).

QUESTIONS PRESENTED TO THE COURT FOR REVIEW.

The question presented in this case is whether the petitioner was deprived of due process of law, in violation of his rights under the Fourteenth Amendment to the Constitution of the United States:

1. By the action of the trial court in overruling petitioner's repeated motions for a change of venue or for a

continuance until the passion and prejudice of the community could subside and forcing him to proceed with the trial in Cuyahoga County at a time when it was impossible for him to have a fair trial there due to the fact that the newspapers and the radio and television stations went far beyond factual reporting, and beginning immediately after the murder of petitioner's wife and continuing uninterruptedly and with increasing volume and viciousness throughout the next five and one-half months and until after he had been tried and convicted, published a series of editorials, cartoons, news stories and articles by feature writers and by columnists, and broadcasts by news commentators, which are unprecedented in the history of this country in their quantity, scope, duration and intensity, purporting to cover all phases of the investigation, indictment, arrest, pretrial and trial proceedings, but much of which material was misleading and some of which was partially false and some completely false, wherein fact, fiction, rumor, suspicion, quotation and misquotation were so blended as to be indistinguishable, and much of which was viciously derogatory of petitioner and his family, for the purpose of inflaming the entire community against petitioner and of prejudicing him in the thoughts and minds of every resident of the community, all of which produced a tremendous pressure for his arrest and conviction and resulted in the creation of such an atmosphere of hysteria and prejudice and of a climate of public opinion so adverse to petitioner as to make the trial a mere legal device for registering the verdict already dictated by the news media and by the public opinion which they had generated?

2. By being tried under conditions existing during the trial and during the deliberations of the jury which were so flagrant that even the majority opinion in the Supreme

Court of Ohio described the trial as having been conducted in the "atmosphere of a 'Roman Holiday' for the news media"?

3. By the ruling of the trial court which prevented petitioner from exercising his last peremptory challenge?

4. By the action of the two officers who were placed in charge of the jury after the case had been submitted to the jury and the jury had been sequestered, and who in violation of their oaths permitted the jurors, during their deliberations, to make telephone calls to the outside and engage in conversations over said telephone without the officials in charge knowing what was said to the members of the jury, all without the knowledge or order of the court?

5. By the action of the authorities in seizing possession of petitioner's home immediately after the murder and retaining possession until after he had been tried and convicted, thereby preventing him from discovering evidence essential to his defense?

6. By the action of the Supreme Court of Ohio in admitting the case on constitutional questions herein set forth and then failing to pass upon those questions?

7. By his appeal to the Supreme Court of Ohio being heard and decided by an illegally constituted court, in that the Chief Justice of the Supreme Court of Ohio disqualified himself from participation in the case and then appointed a judge of a court of appeals to fill the vacancy, instead of the appointment being made by the judge having the longest period of service upon the Supreme Court as required by the Constitution of the State of Ohio?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States.

AMENDMENT XIV.

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Ohio.

"ARTICLE I, SECTION 1.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

"ARTICLE I, SECTION 10.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of

witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself, but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

"ARTICLE I, SECTION 14.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

"ARTICLE IV, SECTION 2.

The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges, and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. If any of said judges shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice, or in case of the absence or disability of the chief justice, the judge having the longest period of service upon that court, may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. The judge of the court of appeals so designated shall temporarily perform the duties of a judge of the supreme court as to such cause or causes designated. * * *"

Ohio Statutes.

SECTION 2505.21, OHIO REVISED CODE. *Hearing on appeal.*

"Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded. * * *"

SECTION 2945.21, OHIO REVISED CODE. *Peremptory challenges in capital cases.*

"On the impaneling of a jury in a capital case, the state and the defendant, if there is only one defendant, may each peremptorily challenge six of the jurors, which challenges shall be exercised alternately. If there is more than one defendant, each defendant may peremptorily challenge six of the jurors, and the state may peremptorily challenge a number equal to the combined number allowed to all the defendants. Neither the state nor a defendant may be deprived of any of the challenges by reason of such order of exercising the same, or the time or manner of exercising the same."

SECTION 2945.29, OHIO REVISED CODE. *Jurors becoming unable to perform duties.*

"If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors,

a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

SECTION 2945.32, OHIO REVISED CODE. *Oath to officers if jury sequestered.*

"When an order has been entered by the court of common pleas in any criminal cause, directing the jurors to be kept in charge of the officers of the court, the following oath shall be administered by the clerk of the court of common pleas to said officers: "You do solemnly swear that you will, to the best of your ability, keep the persons sworn as jurors on this trial, from separating from each other; that you will not suffer any communications to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them, orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged, and that you will not, before they render their verdict communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God." Any officer having taken such oath who willfully violates the same, or permits the same to be violated, is guilty of perjury and shall be imprisoned not less than one nor more than ten years."

SECTION 2945.33, OHIO REVISED CODE. *Keeping and conduct of jury after case submitted.*

"When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. Such officer shall not communicate to any person, before the

verdict is delivered, any matter in relation to their deliberation. Upon the trial of any prosecution for misdemeanor, the court may permit the jury to separate during their deliberation, or upon adjournment of the court overnight."

STATEMENT OF THE CASE.

Marilyn Sheppard, aged 30, was murdered in the bedroom of her home sometime between midnight and 5:40 A. M., on Sunday, July 4, 1954. The Petitioner, Dr. Samuel H. Sheppard, was arrested July 30, and charged with the crime. He was indicted for first degree murder on August 17, 1954. His trial began October 18, and the case was submitted to the jury on the morning of December 17. The jury deliberated from the morning of December 17th until 4:30 P. M., Tuesday, December 21, 1954, including deliberation on Sunday, December 19th. The jury consisted of seven men and five women, and during their deliberations they were in session all day and part of the night. Until they returned their verdict they were in charge of two men bailiffs assigned by the trial court and at night were sequestered at the Carter Hotel, Cleveland, Ohio. On December 21, at 4:30 P.M., the verdict was returned and the defendant was found not guilty of murder in the first degree but guilty of murder in the second degree. The trial court immediately sentenced the Petitioner to the Penitentiary for life. Bail was denied.

The Petitioner was married to Marilyn Sheppard nine years and they lived happily together. At the time of the murder she was carrying her second child.

No motive was established for the murder.

The Peitioner's conviction is based entirely on circumstantial evidence.

Petitioner is a neuro-surgeon and was in charge of the accident work at Bay View Hospital in the City of

Bay Village, Ohio, which is just adjacent to the City of Cleveland. His home, located on the shore of Lake Erie, is a short distance from the hospital. On the night of July 3, Petitioner and his wife, with their son, aged 7, entertained at dinner a neighboring family, which consisted of a man and his wife and their two children. After the dinner the Petitioner's wife and the two neighbors adjourned to the living room of the Petitioner's home, conversed and watched television and listened to the radio. The Petitioner lay down on the couch and fell asleep and was sound asleep when the neighbors departed shortly after midnight, July 4th.

Sometime after, the time has never been ascertained, but it was during the dark hours of the morning, Petitioner was aroused from his sleep by a cry from his wife from the upstairs bedroom. Petitioner ran upstairs to his wife's bedroom and as he entered that room he was immediately assaulted and knocked unconscious. When he recovered to a degree, he heard a noise and went downstairs as rapidly as he could, still suffering from the effects of the blow. Downstairs he saw a form, which he later determined was a man, going out the front door of his home, to a stairway which led down to the lake shore.

He caught up with the man and he was again assaulted and knocked unconscious a second time. When he recovered consciousness he found that he was partially in the lake. How long he lay unconscious on the lake shore is undetermined. He made his way back to the bedroom of his wife and found that she was dead, having been beaten about the head with some instrument that has never been found nor has it ever been determined what instrument caused the wounds on her head. A great amount of blood was spattered on the doors and walls of the room.

The Petitioner called the Mayor of the City of Bay Village, who was the chief law enforcing officer, and who was the Petitioner's neighbor and personal friend. When the Mayor arrived within a very short time after the telephone call, the Petitioner was in a state of collapse and showed evidence of injury. He was conveyed to Bay View Hospital, where it was determined he was suffering from shock, showed objective signs of injury on the face, his mouth was bleeding and cut, his teeth were loosened and he had a contusion of the spinal cord over the second cervical vertebra and brain injury. There was evidence that certain parts of the first floor of the house had been ransacked.

Because the authorities could find no evidence of entry by burglar they immediately accused the Petitioner of the murder of his wife, overlooking the fact that the back door of the house was customarily left unlocked.

Having made the accusation, overlooking and neglecting important clues, the attempt was made to justify the accusation by securing a confession by the Petitioner. He made no confession but always stoutly maintained his innocence and co-operated fully with the authorities.

Other facts material to a consideration of the questions raised by this petition are set forth below in the Argument.

At the opening of the trial in the Court of Common Pleas, Cuyahoga County, Ohio, Petitioner raised Federal questions by moving for a change of venue or in the alternative for a continuance on the ground that in view of the widespread adverse publicity and the resulting hysteria and emotional state then prevalent in Cuyahoga County, he could not receive a fair trial. (Exhibit 2, Aug. 27.) These motions were renewed six times during the trial. In

each instance they were overruled by the court and exception taken. (R. 4-15, 818-831, 1617, 5009, 6795, 6815*).

In an effort to obtain possession of the home of the petitioner the Chief of Police of the City of Bay Village was subpoenaed to bring to court the keys of the home, and thereafter demand was made for the keys in open court. Objection was made by the State and was sustained by the court and exception noted. (R. 6074.)

Petitioner was prevented from exhausting his peremptory challenges when the court disrupted the jury by excluding Juror Manning and seating alternative juror Hansen, to which exception was taken. (R. p. 1617.)

At the hearing on the Motion for a new trial the uncontradicted evidence was that the jury during the five days and nights that it was in session deliberating, was in contact by telephone with outsiders without any permission on the part of the trial judge. (R. 7082, 7086.) Motion for a new trial which incorporated the foregoing claim was overruled and exception noted. (R. 7100.)

In the Court of Appeals of the Eighth Judicial District of Ohio, Cuyahoga County, the federal questions were raised by Assignments of Error No. 7, 8, 9, 13, and 24.

In the Supreme Court of Ohio the federal questions were raised by Assignments of Error No. 3, 4, 5, 6 and 28, both on the Motion to appeal as of right and the Motion to Certify, and also on Petitioner's Application for Rehearing.

The rights, privileges and immunities claimed by the petitioner under the Fourteenth Amendment to the Constitution of the United States and the Sections of the Constitution of the State of Ohio and the Statutes of said State, all above cited, were denied by the State courts.

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* For convenience, pages of the Bill of Exceptions below are cited as "R."

REASONS FOR THE ALLOWANCE OF WRIT.

Each of the questions presents an important issue of law.

1. All of the judges below were of the opinion that the trial took place under unprecedented conditions. The majority opinion states (App. A, p. 85):

> "BELL, J. Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life."
>
> * * * * *
>
> "The law does not require this court to be so naive as to refuse to recognize the great amount of publicity accorded this case from the time of the discovery of the crime up to the present time. Every development has been given the 'full treatment' by the press, radio and television."

2. The extensive coverage of the newspapers, in which they assumed the role of judge, jury and prosecutor; the accusation of guilt, with the demand for arrest and subjecting the Petitioner to the third degree; the scoffing at his claim of innocence because he would not submit to the lie detector test and truth serum; the demand for a confession, holding the Petitioner up to scorn

by the use of cartoons,—all created a strong conviction of guilt in the minds of the readers in this community.

3. This was a trial by newspapers. When the trial began the newspapers, having conditioned the minds of the people that the Petitioner was guilty, found it necessary to justify the position that they had taken, so throughout the trial extensive daily summaries of the testimony were printed, subtle influence was brought to bear upon the jury; there was an adroit manipulation of headlines, and, as stated by John M. Harrison, Associate Editor of the Toledo Blade, in the Saturday Review, October 15, 1955:

> "The press never left any doubt of the verdict it expected, not surprising in view of having plunged so deep into the processes of administering justice by its own rules." (App. B, page 154a.)

4. The press, radio and television not only attempted to influence the judge and jury before and during trial but they did influence them. The conduct of these mediums of public information is of the kind that has been condemned by the courts of England and in the United States by judges, lawyers, bar associations, professors of law and writers on legal subjects, and by responsible newspaper editors.

5. The Petitioner's home was seized by the authorities and held despite the demands of the Petitioner until after he was sentenced to the Ohio State Penitentiary. It developed that had he obtained possession of his home he would have been able to defend himself as guaranteed by the 14th Amendment, U. S. Constitution, and by Article I, Section 1 and Section 10, of the Ohio Constitution, and would have been able to develop, as he did later, that there was present a third person, the murderer, in the

murder room. There was a violation of a fundamental point of law that had found its way into the Constitution of the United States and the Constitution of the State of Ohio that "every man's home is his own castle." *Gouled v. United States,* 255 U. S. 298; *Semayne's* Case, 5 Co. Reports, 91, (1605), *Broom, Legal Maxims,* 347.

6. The proceedings in the Petitioner's trial in and out of the courtroom establishes that he did not receive a fair trial.

7. It is fundamental everywhere that when a case is submitted to the jury that the jury shall not communicate with outsiders except under the direction and order of the judge. This jury during the five days and nights that it was in session was in contact by telephone with outsiders without any permission on the part of the judge.

8. An examination of the record raises serious questions as to whether the verdict is proper. See dissenting opinion (App. A, p. 99).

> "I have grave difficulty in concluding that any reasonable man could either (1) fail to have a reasonable doubt as to whether defendant killed his wife, or (2) 'after the entire comparison and consideration of all the evidence * * * feel an abiding conviction to a moral certainty' that defendant killed his wife, or (3) determine that the circumstantial evidence excludes every reasonable hypothesis except that defendant killed his wife, or (4) conclude that the only probable or natural explanation of the proved facts and circumstances is that defendant killed his wife. * * *"

9. The decision of the Supreme Court of Ohio is in conflict and variance with *In the Matter of Lee Roy Murchison and John White, Petitioners,* 349 U. S. 133; *Moore v. Dempsey,* 261 U. S. 86; *Shepherd v. State of Florida,* 341 U. S. 50; *John D. Pennekamp and The Miami*

Herald Publishing Co. v. State of Florida, 328 U. S. 331; *Bridges v. California*, 314 U. S. 252; *Rochin v. State of California*, 342 U. S. 165; *Irvine v. State of California*, 347 U. S. 128; *Illinois v. Hryciuk*, 125 N. E. (2d) 61; *Delaney v. United States*, 199 F. 2d. 107; *State of Ohio v. Farmer*, 90 O. A. 49; *State of Ohio v. Clifford*, 162 Ohio St. 370.

10. The decision is in conflict with *United States ex rel. David Darcy, Petitioner, v. Earl S. Handy, Warden of Bucks Co. Prison, et al.*, 351 U. S. 454.

The Supreme Court of Ohio recognized that Petitioner "in this atmosphere of a 'Roman Holiday' stood trial for his life." The very statement recognizes the violation of constitutional privileges and rights and that the trial was unfair. The trial was infected by prejudice and unfairness, so patent as to be startling. Motions for continuance and change of venue, which were timely made and continued throughout the case, were overruled and the proper exercise of a peremptory jury challenge was denied to the Petitioner.

11. In the court below the Petitioner filed twenty-nine (29) Assignments of Error, including the assignments of error that his constitutional rights under the Fourteenth Amendment had been violated. The court passed on only three of the general assignments of error and ignored the error which involved the constitutional rights of the Petitioner.

12. The court that found against the Petitioner was illegally constituted.

ARGUMENT.

I. Petitioner was deprived of due process of law by the action of the trial court in overruling his repeated motions for a change of venue or for a continuance until the passion and prejudice of the community could subside and forcing him to proceed with the trial in Cuyahoga County at a time when it was impossible for him to have a fair trial there due to the fact that the newspapers and the radio and television stations went far beyond factual reporting, and beginning immediately after the murder of petitioner's wife and continuing uninterruptedly and with increasing volume and viciousness through the next five and one-half months and until after he had been tried and convicted, published a series of editorials, cartoons, news stories and articles by feature writers and by columnists, and broadcasts by news commentators, which are unprecedented in the history of this country in their quantity, scope, duration and intensity, purporting to cover all phases of the investigation, indictment, arrest, pretrial and trial proceedings, but much of which material was misleading and some of which was partially false and some completely false, wherein fact, fiction, rumor, suspicion, quotation and misquotation were so blended as to be indistinguishable, and much of which was viciously derogatory of petitioner and his family, for the purpose of inflaming the entire community against petitioner and of prejudicing him in the thoughts and minds of every resident of the community, all of which produced a tremendous pressure for his arrest and conviction and resulted in the creation of such an atmosphere of hysteria and prejudice and of a climate of public opinion so adverse to petitioner as to make the trial a mere legal device for registering the verdict already dictated by the news media and by the public opinion which they had generated.

Misrepresentations by newspapers, radio and television produced a mass emotional excitability which pre-

vented Petitioner from having a fair trial, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 1 and 10, of the Constitution of the State of Ohio. The facts in the case were so publicized that it was the principal subject of debate in Cuyahoga County, Ohio. Prior to the trial, the facts concerning the murder, various interpretations of the facts, rumors, statements about the Petitioner, his family, father and mother, the Bay View Hospital, with which the Petitioner, his father and two brothers were associated, garbled and untrue, were so publicized and circulated in Cuyahoga County that there was established a general mass opinion that the Petitioner was guilty of the murder of his wife. When he went to trial on October 18, 1954, there were few people of the community who did not have or express an opinion in the case.

Beginning on Wednesday, July 7th, three days after the murder, the Cleveland newspapers and "circulation conscious editors" (App. A, p. 86), began a campaign of misrepresentation and sensationalism that is unmatched in the history of American journalism. The radio and television joined in and constant broadcasts were made as to every move on the part of the members of the Sheppard family and the officers participating in the investigation. All of which directly pointed to the Petitioner as the murderer of his wife.

The city of Bay Village was overrun with reporters, photographers, radio and television men. The homes of the Petitioner's brothers and their father, and the Bay View Hospital, became objects of curiosity, and their family life became the subject of general discussion and gossip. Thousands of people drove out West Lake Road past the Sheppard home, causing a terrific traffic problem

for the police. (Petitioner's Ex. 2, *Press*, August 10, motions for change of venue and continuance.)

Interviews with most anyone who would talk about the case were printed in the newspapers, interviews were given by the police, by the Coroner, the prosecuting attorneys, all of which were printed in large headlines and broadcast generally, and slanted against the Petitioner. There was a general conditioning of the public to the effect that the Petitioner had committed this murder; that he was being guarded by his attorneys and members of his family, who were alleged to be interfering with the police and the Coroner's office, all of which was untrue as the record discloses that the Petitioner and his family cooperated fully with all authorities.

The Ohio Court of Appeals, Eighth Judicial District, in its Opinion, discussing the assignments of error (App. A, pp. 28-9), stated:

> "The record shows that the case from the date of Marilyn Sheppard's death until after the verdict was returned and the motions for new trial were filed and heard, received unusual coverage by the press, radio and television. No case in this community ever attracted such public interest or received so much attention by news disseminating agencies. Some of said publicity unquestionably was intended to spur on the investigation and was highly critical of the defendant and went so far in some instances as to have been designated by other newspapers as an attempt to try the case in the public press before he was indicted."

A series of printed stories, some partially false and some completely false, were printed in the Cleveland newspapers for the purpose of inflaming the community against the Petitioner and prejudicing him in the thoughts and minds of every person in the community. He was prejudged and found guilty by the community before he was

arrested. His arrest and indictment was forced by this campaign. It is impossible to set forth the radio and television coverage but it is recognized that those mediums gave the most complete coverage that any event that occurred in Cuyahoga County, Ohio, ever received. The newspapers day after day carried eight column headlines, type one inch or more, together with front page editorials, numerous pictures and cartoons. (See cartoons, editorials and photographs set forth in App. B.)

It is impossible to get the full impact of this newspaper campaign without examining the clippings which are set forth in petitioner's Exhibits 1 and 2 on the motion for change of venue. However, some indication of the type of opinion-forming material to which the public was constantly subjected is shown by the following headlines which appeared in the Cleveland newspapers from July 7th on:

GERBER WANTS DOCTOR TO CLEAR UP QUESTIONS

GERBER IRKED, GETS SUBPOENAS FOR INQUEST

CORONER MOVES TO END BAY MURDER "STALLING"

GERBER SAYS FAMILY FAILS TO COOPERATE

SHEPPARD REJECTS LIE TEST

DOCTOR VARIES STORY, BARS LIE TEST NOW

PUSHES FOR SHEPPARD LIE TEST

DOCTOR IS WELL ENOUGH NOW, GERBER SAYS

"CRIME" DOCTOR IN MURDER QUIZ

DR. SHEPPARD BACKS AWAY FROM "CRIME DOCTOR'S" TALK

DR. SHEPPARD REFUSES TO TAKE TRUTH SERUM IN MURDER PROBE

DR. SHEPPARD BARS TRUTH TEST

MAYOR HOUK REVEALS HE VOLUNTARILY TOOK LIE TEST IN BAY PROBE

SHEPPARD'S "DREAM WORLD," LOSS OF MEMORY ARE PROBED

DOCTOR'S INDICTMENT NEAR IN MURDER OF HIS WIFE

WEIGHS MOVE TO ARREST DOCTOR

BAY AIDE SEEKS MORE INFORMATION BEFORE DECISION ON ARREST

CITY THREATENS TO QUIT IF BAY REFUSES ARREST

AGREE TO JAIL DOCTOR; ACTION LIKELY TONIGHT

JAILED DOCTOR SAM FACES QUIZ ON MARILYN'S FEAR OF HIM

POLICE ASSERT COUPLE HAD VIOLENT ROWS

SHEPPARD'S REFUSAL TO TALK BALKS QUIZ

PROBERS OF SHEPPARD MURDER CAN'T FIND ANOTHER SUSPECT

DR. HOVERSTEN HERE FOR NEW QUIZ; HELPS CASE, STORY SAYS

DR. HOVERSTEN TAKES LIE TEST

CITY REPRIMANDS EMPLOYEE FOR AIDING SHEPPARD

SHEPPARD CALLED "CRY BABY" OVER PICTURE OF MARILYN

DR. SAM'S PROWLER STORY HIT

SCANDAL WAITING FOR CUE AT TRIAL

GERBER'S PUNCHES BATTER AT DR. SHEPPARD'S DEFENSE

THEORY OF "STERILITY" FEARED BY DR. SAM

SPECTATOR'S VIE TO VISIT SAM'S TRIAL

On Tuesday, July 20th, the Cleveland Press printed a cartoon on the front page of a man with a weapon and an editorial on the front page headlined:

"GETTING AWAY WITH MURDER."

The editorial discussed the fumbling of the police and the protocol in the case:

> "In the background of this case are friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person in similar circumstances is subjected * * *. It's time that somebody smashed into this situation." (App. B, p. 115a.)

The petitioner's connection with Bay View Hospital, due to this publicity, now began to affect the hospital, and people in Bay Village, caught up in the emotional excitability produced by the sensational publicity, were moving against an institution which was serving the sick and the injured; an institution recognized by the State Board of Health, the recipient of a grant under the Hill-Burton Act, and conducted by a Board of lay trustees, who are permanent and representative citizens of the community. (R. 5015.)

The newspapers began to fill the minds of the general public with the results that might be obtained from the lie detector and the use of truth serum, and gave the impression that because he did not submit to the lie detector and truth serum he was hiding his guilt.

In the course of the trial questions were asked by the Prosecutor about the lie detector and truth serum in such a way that the jury was reminded of the claims made by the newspapers that the Petitioner had refused to submit to the lie detector and truth serum, to which Petitioner objected and was overruled. (R. 5306-10.)

On Wednesday morning, July 21st, the Plain Dealer reported that the Petitioner was not cooperative, and published this statement by the County Coroner: "The use of truth serum and quick acting barbiturate, usually sodium pentathol, is not a treatment but a diagnostic aid. If Sam

Sheppard is anxious to aid the authorities in the solution of the horrible death of his wife, avoid unjust criticism and character assassination, he will submit to this test, which gave valued aid to the armed services in World War II."

The Mayor of the City of Cleveland, which city adjoins the City of Bay Village, joining the hue and cry, announced: "If the investigation had been handled differently from the start, we would have had a solution by now." He also stated that the facilities of the City of Cleveland were at the command of the City of Bay Village, and Cleveland Chief of Police Story put in a call for Captain Kerr, Head of the Homicide Squad, who was vacationing in Florida, and announced that when Kerr returned there was to be harassing and extensive questioning of the principals in the case.

The Chief of Detectives of the Cleveland Police Department, indicated that he would bring the Petitioner to the Central Police Station for questioning. "We don't interview suspects; we interrogate them on our own grounds."

These statements were published in the local newspapers.

The record shows that through the entire time the Petitioner was meeting with every police agency that wanted to talk to him and had cooperated in every possible way with the authorities.

The same day the entire Sheppard family, the father and mother of the Petitioner, his brothers and their wives, were summoned to appear on July 22nd at the County Prosecutor's office.

On the same evening the County Coroner, referring to the claim that the petitioner had refused to submit to truth serum, made the announcement which was pub-

lished: "We can interpret this as meaning we could expect no further cooperation from Dr. Sheppard in this investigation." He further stated that he did not intend to accept the Petitioner's refusal to submit to truth serum and referred to a sheaf of subpoenas in his pocket: "I have use for them in the Sheppard case; I don't know when I will have to get rough but I am prepared to do so the moment it will aid the investigation in any way."

In the early edition of the *Cleveland Press* on July 21st there was a front page editorial headed:—

"ISN'T THIS MURDER WORTH AN INQUEST?"

and in a later edition the headline over the editorial was the demand:

"WHY NO INQUEST? DO IT NOW, DR. GERBER."

(See App. B, pp. 117a, 119a.)

After this editorial appeared, the County Coroner reacted immediately, and in response to the demand of the Cleveland Press, subpoenaed all the members of the Sheppard family, including the Petitioner, the police officers of the City of Bay Village, a Dr. Hexter, who had examined the Petitioner for the Coroner, and the Superintendent of Bay View Hospital. All of the persons subpoenaed had made statements which were in the hands of the police and the Coroner. This totally unnecessary proceeding was staged solely to add to the hysteria and prejudice in the community against the Petitioner. The Coroner selected Normandy School in Bay Village instead of the well equipped County Morgue Building, which is located in the central part of the City of Cleveland, because he wanted to have an audience (R. 3453), and desired to satisfy the people (R. 3452).

The conditions surrounding the inquest were rather frightening. (R. 5079.) There were great crowds of peo-

ple, numerous reporters and curious onlookers, principally young women. The gymnasium where the inquest was held seated several hundred people and the room was crowded to capacity. Across the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment was set up in the room. Many photographers were present, constantly taking pictures, especially of the members of the petitioner's family and the petitioner when they appeared as witnesses. The photographs of the scenes at the inquest were submitted to the court and introduced in support of the motions for continuance and a change of venue. (See App. B, pp. 157a to 161a.)

Two detectives acted as bailiffs. The Prosecutor acted as adviser to the Coroner. The room was set up so that the witnesses had to face the audience. There were two microphones on the table, one for the Coroner, who conducted the examination, and the other in front of the witness, so that what was said would be broadcasted.

When Dr. Stephen Sheppard, the brother of the petitioner, and the petitioner entered the building they were searched in full view of a large crowd of people.

The inquest continued all day Thursday, July 22nd; Friday, July 23rd; and Monday, July 26th.

The attorneys representing the petitioner were present at the inquest, but it was held by the Coroner that they could appear only as spectators and could make no objections of any kind whatsoever. (R. 3459.)

The questioning by the Coroner was not for the purpose of developing information that would throw light upon who murdered Mrs. Sheppard but were such questions that would create sensational reading and undoubtedly were inspired by the agencies of publicity that were

present at the hearing. The sex angle was injected, which made the day's top story.

The Cleveland newspapers and the radio and television stations gave full coverage, word by word, to all the testimony, with the usual opinion-forming headlines.

An indication of the wild emotionalism that had gripped the public is shown by the reaction of the spectators at the inquest as reported in the *Press* July 26th, and the *Plain Dealer* July 27th (Petitioner's Ex. 1), on a motion for change of venue and continuance):

> "WOMEN APPLAUDED WHEN SAM'S ATTORNEY WAS FORCIBLY EJECTED FROM THE HEARING. GERBER WAS HUGGED AND KISSED BY THE SPECTATORS AFTER HE RECESSED THE THREE-DAY HEARING. WOMEN CLUSTERED AROUND HIM, PATTED HIM ON THE BACK AND OTHERS CLASPED HIS HANDS."

It is also shown by the reaction of the Coroner on July 26th when he asked the Cleveland Press to pass the word along to the hundreds of people who had written him letters about the Marilyn Sheppard murder case and asked the *Press* to give those people his thanks. He also noted that most of the correspondence reached the same conclusion about the case.

The three day session had been a stellar attraction for the young women suburbanites, attired in shorts and sun dresses; "it was better than the Kefauver hearings" they reported. At the conclusion of the inquest the newspapers published the statement by the Coroner: "I could order Dr. Samuel H. Sheppard held for action by the Grand Jury."

On July 26, the Chief of the Cleveland homicide squad, who had been on vacation in Florida, was flying home. When he was reached enroute by the Cleveland

Press, they quoted him as saying: "If there were immediate arrests, the case would have been solved in four hours. In homicide investigations we treat doctors and lawyers and everyone alike," and the next morning the *Plain Dealer* interviewed him on his way back to Cleveland and he said, "This would have been a one day wonder if they had made an immediate arrest * * *. It is a disgraceful situation that Bay authorities did not arrest Dr. Samuel Sheppard * * *." On the same day Common Pleas Judge Arthur Day stated he would not discharge the Grand Jury as originally planned; the jury possibly could consider the Sheppard murder. (Petitioner's Ex. 1 on motions for continuance and change of venue, July 26.)

On Wednesday, July 28th, on the front page of the Cleveland Press appeared an editorial next to petitioner's picture, entitled,

"WHY DON'T THE POLICE QUIZ THE TOP SUSPECT?"

although the fact was that petitioner had willingly submitted to frequent interrogations and had given full statements to the authorities. On Friday, July 29th, the same newspaper in its early edition carried a front page editorial headed,

"WHY ISN'T SAM SHEPPARD IN JAIL?"

In the later editions the editorial was headed:

"QUIT STALLING. BRING HIM IN." (App. B, p. 129a.)

After the appearance of this editorial there was a hastily called meeting at the Cleveland City Hall, at which were present Director of Public Safety, Chief of Police, Chief of Detectives, Chief of the homicide squad, and the Mayor of the City, who made the angry announcement that "We feel that we have not received the full coopera-

tion of Eaton and Houk. Unless Houk shows more aggressiveness, the Cleveland Police will be compelled to finish their job," and McCormick declared: "We want Dr. Sheppard arrested so we can talk to him."

The Grand Jury foreman announced in the newspapers that he and all members of the panel had been instructed by Judge Arthur Day to stand by, to wait for a special session, and the Mayor of the City of Cleveland further announced that, "We are getting impatient about all the dilly-dallying in this case. It was agreed when we took over the investigation that we would be in full charge, with the exception of making the arrest. It is all right for the Bay Village people to consult their lawyers, but there is no point in us staying in the case if the recommendations of our Homicide Squad concerning this man are not followed." (*Press, News*, July 30, Petitioner's Ex. 1—Motion for Change of Venue and Continuance.)

On the night of July 30th at 10:00 P. M., Petitioner was arrested. He was at his father's home, where he had been living since he was discharged from the hospital on July 8th due to the fact that he was excluded from his own home, which the police had unlawfully seized. There was a gathering around the home of the petitioner's father very early in the evening of a disorderly crowd, verging on a mob, including reporters and photographers. The home is approximately 250 feet back from the highway. There was a screaming and shouting mob on the property between the highway and the house. Finally the officers appeared for the arrest. (R. 5683-5684.) People were looking in the windows and taking flashlight picture through the windows. (R. 6337.) When the police arrived, Dr. Sheppard, Sr., requested the grounds to be cleared so that the automobile in which the petitioner was placed could proceed out of the grounds. The crowd

mounted the porch and lined the driveway as the petitioner, manacled to one of the officers, started on his way to the City Hall of Bay Village. (R. 6338.) Groups of cars followed the car in which the petitioner was a prisoner. On arrival at the City Hall a great crowd of people had assembled; young people running around, photographers and reporters and onlookers. The petitioner was taken from the car and placed in a large room and then was brought before the President of the Bay Village Council at 11:00 P. M., and in the presence of a great many people, including photographers and reporters, he was arraigned and charged with the first degree murder of his wife.

He stated that his attorney was on the way and requested a delay of a short time until he could arrive, but this was denied and he was informed that he could see an attorney in jail. He was arraigned without counsel in a capital case and required to plead and was then lodged in jail. He was brought to the County Jail shortly before midnight and placed on the fourth floor. It was Friday night. The regulation for the fourth floor of the County Jail for the visiting hours is between 1:00 P. M. and 3:00 P. M. on Friday. Consequently, the petitioner could not see any visitors until the succeeding Friday.

The rumor was that the petitioner was a dope fiend and all that had to be done to break the case was to throw the petitioner in jail and hold him incommunicado from his brothers and his attorneys and that his craving for dope would compel him to confess. (R. 2706.) That is the reason why the fourth floor of the County Jail was selected for his confinement.

The police now proceeded to try to make good the accusation which they had made on July 4th,—to secure a confession from the petitioner by the use of mental abuse.

On Saturday morning, July 31st (R. 6345), he was taken to the eleventh floor of the County Jail and confronted by the Chief of Police, the police physician, and a neuro-surgeon. He was then taken back to the fourth floor and grilled by police officers. The method outlined by Head of the Homicide Squad, on Monday, July 26th, was beginning to take form.

The first police that came were the officers who had accused him of the murder on the afternoon of July 4th, and they questioned him from 1:00 P. M. until after 6:00 P. M. When they finished he was questioned in relays by other officers from 6:00 P. M. to midnight. They tried to get him to agree to things that he did not say. They insulted his family and his profession. They used profanity and intimated that petitioner was the most low-down individual they ever encountered, and made insulting remarks about his family and brothers, called him vile names; stated that he had ruined Bay View Hospital and the Mayor, and that they had definite evidence that other people were involved in the murder and the petitioner was trying to cover up for an accomplice; that they had never run into anyone so low down.

On Sunday, August 1st, he was given an opportunity to see his attorney (R. 6366). About 1:30 in the afternoon he was in conference with his attorney and police officers came to the jail. The Sheriff told the attorney he would have to get out; both the petitioner and the attorney protested, but to no avail; the Sheriff told the attorney to get out so that the police could question the petitioner, and after the attorney was ejected from the jail the police questioned him from 1:30 to 4:30 P. M.

As soon as they left a new group of police inquisitors appeared. They examined him for traces of hypodermic needles to ascertain whether he was a dope fiend and

questioned him about taking dope. They left about 8:30 Sunday evening.

The questioning by officers in relays continued through Monday. All their activities were duly reported with the usual headlines, and in such a manner that the community was eagerly waiting for the confession that they were sure would come.

The petitioner was taken out of jail on the morning of August 2nd by the police to the Detective Headquarters of the Cleveland Police Department and subjected to Bertillon pictures and fingerprinting. The Bertillon pictures appeared in the afternoon newspapers. (See App. B, p. 133a.)

On Monday night, August 2nd, at 7:00 P. M., four officers manacled him and drove him around the river flats of the city for some time. Upon inquiring as to what was going on and where he was going, they said, "You'll find out," and he finally discovered his destination was the Cleveland City Hospital. (R. 6374.)

On his arrival at the hospital he was taken to the X-Ray Department, where he met the doctor who had talked to him in the jail with the Police Chief, and the Cleveland Police Surgeon. He had no acquaintance with these doctors; there was present also another doctor and a technician.

They removed all his clothing and then had him remove the orthopedic collar he was wearing, and took X-rays of his body. The three doctors examined him, one by one; as one would examine, the others would watch. They subjected his entire body to neurological examination, checked for areas of numbness, the reflexes, stuck pins in him in various places, and went over him from head to toe. They compelled him to move his arms, legs and body, and insisted on moving his neck, which

was still painful. He was returned to his cell in the County Jail at about 11:00 P. M. This was all without the knowledge or authorization of his counsel.

At the trial the petitioner testified to the foregoing unwarranted and unlawful conduct of the police and the doctors. The police made a public announcement that the petitioner was a liar, but no police officer or doctor took the stand to refute the petitioner's testimony.

On Monday, August 2nd, a writ of habeas corpus was filed, which was denied. The filing of the writ of habeas corpus was represented to the public as an invasion by the lawyers of the rights of the police. The Cleveland Plain Dealer, on the day that the habeas corpus was filed, Monday, August 2nd, carried the headline: "Lawyers Delay Quiz of Doctor" (Petitioner's Ex. 2 on motions for Change of Venue and Continuance), referring to the fact that the habeas corpus proceeding would necessitate the petitioner being removed from the jail to the courtroom.

On the same day appeared the headline: "Detectives Held Up by Two Visits." This headline and the account following it was to inform the public that the lawyers are interfering with the police questioning.

The *Plain Dealer* on August 5th printed a cartoon of the head of a sphinx mounted on the body of a dog with a collar around its neck, which represented the orthopedic collar that was worn by the petitioner on the advice of his physicians because of the spinal contusion at the base of the brain which he had received in the struggle with the murderer of his wife. The purpose of the cartoon was to give the impression that the petitioner was conducting himself like a sphinx. (See App. B, p. 141a.)

On August 6th the *Cleveland News* carried a feature article on the front page, capped by a double headline in heavy type:

"SHEPPARD 'GAY SET' IS REVEALED BY HOUK"

Mayor Houk testified for the State at the trial. But neither he nor anyone else gave any testimony to support this statement. However, the damage to petitioner in the minds of the public had been done and could not be erased.

On Saturday, August 7th, the petitioner filed in the Common Pleas Court a petition for change of venue on the ground that the President of the Council of Bay Village, before whom the preliminary hearing was set on the warrant, was prejudiced.

The vicious, prejudicial publicity continued with increasing crescendo. On Monday morning, August 9th, the Plain Dealer headline was:

"VICTIM'S KIN HITS SHEPPARD ACTION."

There followed a long interview by some undisclosed, allegedly close relative, giving information about claimed mistreatment of Mrs. Sheppard by the petitioner. No one appeared as a witness to support any such story and there is not a word of testimony that shows any mistreatment by the petitioner of his wife.

On Tuesday, August 10th, the *Cleveland News* contained the headline:

"ASK JURY ACTION IN MURDER QUIZ;
STORY IS IMPATIENT WITH DELAYING LEGAL TACTICS."

Referring to the fact that the petitioner had filed an Affidavit of Prejudice in the Common Pleas Court.

On Tuesday, August 10th, the *Press* carried the headlines:

"CARAVANS OF CURIOUS SNAG LAKE ROAD DAILY;
RECHECK MURDER EVIDENCE;
POLICE CONFIDENT OF EVIDENCE FOR SHEPPARD TRIAL."

Petitioner's Affidavit of Prejudice was heard by Judge Frank J. Merrick, of the Common Pleas Court of Cuyahoga County, who found that the president of the council was disqualified. The preliminary hearing on the murder warrant was set by Judge Merrick to be heard by Judge Thomas on August 16th. The State requested a continuance, which was granted, and the Petitioner was released on bail.

On August 17th, following the release of the petitioner on bail, the headlines in the *Plain Dealer* were:

"THREATEN TO QUIT SHEPPARD PROBE;
McARTHUR SHOCKED AS SHEPPARD LEAVES JAIL."

and there followed the statement that McArthur, who was the chief of detectives of Cleveland, threatened to pull his men off the Sheppard case, stating, "I am shocked"; and Homicide Detective Kerr snapped, "I guess law and order are for poor people." Prosecutor Cullitan remarked, "I never heard of it in my twenty years here." Assistant County Prosecutor Danaceau criticized the judge for granting bail.

On Monday, August 16th, and Tuesday, August 17th, the Grand Jury heard witnesses. All the activities were bulletined in headlines and pictures of the Grand Jury were printed on the front page of the newspapers. (Petitioner's Ex. 2, Motions for a Change of Venue and Continuance.)

The indictment was the result of pressure put on the Grand Jury by the public and the newspapers. The foreman of the Grand Jury testified that "the pressure on us has been enormous." (App. B, p. 176a.) The indictment was returned on August 17th at the unusual hour of 5:00 P. M.

Immediately following the indictment a capias was issued for the petitioner by Judge Arthur Day, although

he knew that the petitioner had been freed on bond of $50,000 by his associate, Judge Thomas, and petitioner was immediately rearrested. The petitioner was arraigned before Judge Day on August 20th.

We have shown the tremendous amount of publicity throughout the community that preceded the trial. The voir dire examination discloses the extent to which this publicity had reached the jurors. Three of the jurors, Howard L. Barrish, Frank Moravec and James C. Bird, had read about the case in the newspapers. (R. 62, 961 and 1114.) Seven of the jurors, Mrs. Louise K. Feuchter, Mrs. Ann W. Foote, Mrs. Beatrice P. Orenstein, Mrs. Luella Williams, William C. Lamb, Jack Hansen and Mrs. Lois Mancini, had heard about the case through the newspapers, radio and television. (R. 345, 418, 452, 748, 1212, 1464-5, 1563.) Juror Edmond L. Verlinger had heard about it through the newspapers and radio (R. 184), and juror Frank J. Kollarits through the newspapers and television. (R. 1303.) Only Mrs. Elizabeth A. Borke said that she had not seen anything about the case in the newspapers nor had she heard anything about it over the radio or television, but the *Press* was delivered to her home. (R. 128.) The most illuminating answer was given by juror Barrish, in answer to questions by the court, when he volunteered his reason for reading the newspapers ever since he had been summoned for jury duty thirty days before (R. 62):

> "Q. You say you have read something about this matter?
>
> A. Yes.
>
> Q. Every day since that time?
>
> A. That's right. I have been following it up because if I was chosen I'd know something about the case."

The venire of the persons who were to serve as petit jurors was drawn by the Clerk thirty days prior to the day fixed for trial, as provided by law. Then occurred an unusual situation. The names and addresses of all the prospective jurors were published in all three Cleveland newspapers. The publishing of these names was not accidental. Such publication was unprecedented in the administration of justice in Cuyahoga County. By the publication of the names of the jurors in this way everyone who knew them had an opportunity to discuss the case with them and express their opinions and say what they would do if they were on the jury. The newspapers had taken a particular stand and they were now in the same position as the authorities. They had to save face and the only way that it could be done in this situation was by securing a conviction of the petitioner, and every method, subtle and otherwise, was used to that end. (Petitioner's Ex. 2, Motion for New Trial and Change of Venue. *News, Press,* Sept. 23.)

As a result of the continuous campaign of derogatory publicity against the petitioner, the minds of the general public had been so affected that it was impossible for the petitioner to have a fair trial before an unbiased and impartial court and jury. He had been convicted in the public mind before the trial began. Under the law as stated in *Shepherd & Irvin vs. Florida,* 341 U. S. 50, the trial court should have granted petitioner's Motions for a change of venue and continuance, and by denying the motions deprived the petitioner of his rights guaranteed by the Fourteenth Amendment.

> "If freedoms of press are so abused as to make a fair trial in a locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence." *Shepherd & Irvin v. State of Fla.,* 341 U. S. 50-55.

The Supreme Court in the above case, referring to prejudicial influences outside of the courtroom, stated the following:

> "* * * But prejudicial influences outside of the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were pre-judged as guilty, and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated." p. 742.

No statement could be more applicable to the situation in the instant case.

II. Petitioner was deprived of due process of law by being tried under conditions existing during the trial and during the deliberations of the jury which were so flagrant that even the majority opinion in the Supreme Court of Ohio described the trial as having been conducted in the "atmosphere of a 'Roman Holiday' for the news media."

The evening after the trial began Radio Station WHK broadcast a debate at 9:30 P.M., between Forrest Allen, of the *Cleveland Press,* and James Collins, the City Editor of the *Cleveland Plain Dealer,* and the subject of the debate was as to which newspaper deserved more credit for the indictment of the petitioner.

During the debate, a Mr. Seeger asked Mr. Allen: "You are making your defenses on the basis of what the Press did was good investigative reporting, so I ask, 'Do you think so?' and then, too, 'If so, what did it produce?' "

Allen: "I think the Press' handling of the Sheppard story *produced the trial that we have got over there today because I don't think the officials were going to do anything about it.*" (Emphasis added.)

Sidney Andorn, a noted Cleveland columnist and news commentator, on October 22, 1954, wrote in his column (R. 819):

> "77 solid days of this delicious dish, and right now you are demanding more. You, the public, are the ones who have been circulating an unending string of jokes about this brutal killing. Some of them are parlor stories, most of them are lascivious, and we worry about juvenile delinquency! * * *
>
> "What is there about it that frenzies us into an orgy of salacious sensationalism, or more to the point, what is there about us who are frenzied? Does Cleveland need mass psychiatry?"

During the trial the same opinion-forming headlines as had characterized the newspaper coverage from July 4th were continued. (See Petitioner's Ex. 1 on Motion for a New Trial.)

Continuing the propaganda for convicting the petitioner and the conditioning of the public and the jurors who were either seated in the box at that time or were to be called, the *Cleveland Press* on Saturday, October 23rd, while the trial was in recess, displayed an eight column headline across the top of the page, followed by an editorial:

"BUT WHO WILL SPEAK FOR MARILYN."

(App. B, p. 135a.)

This editorial was to impress upon the jury that while the petitioner was represented by competent counsel, there was no one representing Marilyn Sheppard, the dead woman.

During the days before the trial, the court had erected inside the bar a long table for the use of reporters; one end of that table was within six inches of the last chair in the jury box; a microphone was installed in front of the wit-

ness chair connected to three loud speakers in the courtroom. The size of the courtroom is 52 feet by 21 feet. This was the first time in the history of Cuyahoga County that such apparatus was erected in a courtroom and there has been none since this trial.

There are four rows of benches outside the bar for the use of the public. The first three rows of benches were assigned to newspaper photographers, radio and television personnel, and the court had the names of the persons posted on the seats at regular spaces so that they would have a reserved seat. The only regular bench in the courtroom available to spectators, including the petitioner's family, was the last bench in the courtroom, seating about 14 people.

Throughout the trial many people packed the courtroom, using all the available space inside the bar that was not occupied by the court, the jury, the reporters' tables and the trial tables, and a great number of people huddled in the door leading from the courtroom to the room that adjoined the judge's private office. The petitioner was asked on one occasion to point out who he knew in the packed assembly on that court day and said he knew but four persons. (R. 6272.)

Assigned to newspaper, radio and television personnel were all the available rooms on the courthouse floor, including the assignment room, where cases are assigned to other court rooms for trial. In these rooms the radio and television stations and newspapers had private telephone lines installed and all other necessary equipment to carry on their work.

Also erected in the rooms on the trial floor were special telephone booths and telephone equipment which was used to forward with dispatch the reports of the trial. Rooms were also assigned to radio commentators on the

third floor of the Courthouse. This is the floor on which the jury deliberating rooms are located. One such room located next to the room occupied by the jury that tried this case was used by Radio Station WSRS, and broadcasting continued from that room throughout the trial, and during the time the jury was in that room during recess, and during deliberations of the jury. (R. 1-25.)

Assembled in the hall outside the courtroom were photographers from the newspapers and television lights were stationed there, during the entire trial. (Affidavit on Motion for New Trial, App. B, p. 171a.)

A motion was made that the table occupied by news reporters, which was at one end within six inches of the jury box, thereby permitting the jurors to overhear conversations between the reporters, be removed from inside the bar and that the signs placed on the benches be removed. At the opening of the trial under these circumstances, motion was made for a continuance and a motion for change of venue, both of which were overruled. (R. 1-20.)

In renewing the motion for a change of venue and continuance on Monday, November 22nd (R. 3719), it was called to the attention of the court that since the trial started the halls and rooms surrounding the courtroom had been filled with reporters, television operators and photographers; that each morning the petitioner was brought into court at least ten minutes before the beginning of the trial and for a period of time was subjected by many photographers and television cameras, against his will, to be photographed. (R. 3719.) (App. B, pp. 167a, 168a.)

On November 22nd there was enacted on the courthouse steps a TV Programme, which was going on as the jury was entering the courthouse, and the judge, prosecutor and Detective McArthur, who had been at the trial

table, were all televised. This was a commercially sponsored TV program directed by one Fabian, who was a correspondent of the Scripps-Howard Newspapers. (See affidavit in support of a motion for a new trial, Appendix B, p. 173a.)

On Sunday night, November 22nd (R. 3723), Bob Considine, a reporter and radio personality and who was present during the entire trial, in a commercially sponsored broadcast from Station WHK in Cleveland, broadcast a comparison between the petitioner and Alger Hiss, who had received notoriety because of his betrayal of a trust as an official of the United States Government and related that the denial of guilt by the petitioner to a police officer and the denial of Alger Hiss when he was confronted by Whittaker Chambers was in the same category. The Court stated, when it was called to his attention when a motion for change of venue and continuance was renewed, that he had not heard the broadcast, and in passing on the application stated: "Well, I don't know, we can't stop people in any event listening to it; it is a matter of free speech and the court can't control everybody."

The Court was requested to inquire of the jury as to whether they had heard this broadcast and the court replied: "We are not going to harass the jury every morning." The Court: "It is getting to the point where if we do it every morning we are suspecting the jury * * *." The Court refused to make any inquiry or to instruct the jury. (R. 3719-25.)

In a cleverly calculated method of influencing the jury, the *Cleveland Press* sent a reporter and a photographer to the home of Lois Mancini, a member of the jury, and interviewed Mrs. Mancini's mother and Mrs. Mancini's husband and children, and pictures were taken of all the members of the family inside the Mancini home, showing

the activities of the family while their mother was serving on the jury, and the pictures were printed in the *Press* and the stories of the difficulties of the family while the mother and wife was serving on the jury were related in full. The pictures and the account were published on Thanksgiving Day so they could not fail to come to the attention of the other members of the panel and it could not help but be a subject of discussion among the members of the jury, and the failure of the court to take any action against them indicated to the jury the approval of the court of this unwarranted, unlawful and unheard of action on the part of the *Cleveland Press*. When it was called to the Court's attention on reconvening after Thanksgiving Day, the Court brushed it aside with the statement, "I don't know what to do about it." (R. 4268.)

On December 8th it was called to the attention of the Court that Walter Winchell, the well known radio commentator and newspaper columnist, on his Sunday night television broadcast, which was heard by millions of people and which was carried by the radio in Cleveland, stated that a woman named Carol Beasley, of Nashville, Tennessee, who was under arrest for robbery in the City of New York, had announced that she was the mistress of the petitioner and he was responsible for the birth of her child. Some of the jurors said they heard the broadcast. (R. 5428.) When it was called to the Court's attention he replied, "I think it is outrageous," but he didn't see what it had to do with the trial. (R. 5427, 5428.)

These events and others that occurred throughout the trial were made the subject of a motion for a continuance and withdrawal of a juror, all of which were overruled.

On Wednesday, November 24th, the *Cleveland Press* carried a double-column headline on the front page as follows:

"SAM CALLED A 'JEKYLL-HYDE' BY MARILYN, COUSIN TO TESTIFY."

Then follows a story printed on the most prominent place on the page, as follows:

> "Two days before her death Marilyn Reese Sheppard told friends that her accused husband, Dr. Samuel H. Sheppard, 'Was a Dr. Jekyll and Mr. Hyde' * * * One of Mrs. Sheppard's 'Dr. Jekyll and Mr. Hyde' statements was made to Bay Village Mayor J. Spencer Houk as recently as last June, the Press learned." * * *
>
> "Mrs. Sheppard used the 'Jekyll-Hyde expression frequently in confidential conversations during the past several years,' friends and relatives told the murder investigators."

This false and mind-conditioning account was published for the purpose and had the effect of vilifying the petitioner in the minds of the jury and the public. It is not justified by any evidence produced at the trial. Neither Mayor Houk nor Marilyn's cousin, both of whom were on the witness stand, gave any such testimony, nor did any other witness so testify. (R. 4266, Exhibit 66.)

The jury was constantly televised and photographed. Pictures of jurors appear in the *Press* and *News* October 19th, and the *Plain Dealer*, October 20th; in the *Press* and *News*, October 20th; in the *Press* and *News*, October 21st; in the *News*, October 22nd; in the *Plain Dealer*, October 22nd; in the *Press* and *News* of October 25th; in the *Press* and *News*, October 26th; in the *Plain Dealer*, *Press* and *News*, October 27th; in the *Press* and *News* of October 28th, and on the 28th, the picture of Susan Hayes was set up with the pictures of the jurors. In the *Plain Dealer* of October 28th were pen sketches of the jurors; on October 29th were pictures and descriptions of each juror; in the

News and *Press* of November 1st were pictures of the jurors; *Press*, November 2nd, jurors' pictures. November 3rd in the *News* and the *Press* were pictures of the jurors at the Sheppard house, visiting the premises. On November 4th, *Press*, pictures of the jurors and the helicopter's pictures of the house and the jurors visiting the scene.

November 4th, the *News*, pictures of the jurors, and on Saturday, November 6th, pictures of the women jurors over the headline, "Women Jurors Give Color to Drab, Grim Scene at Murder Trial," and description of the various women jurors, how they dress, how they looked, etc. They were being glamorized.

On December 17th, pictures in the *News*, pictures of jurors arriving in court, and the *Press*, pictures of all the jurors. December 20th, in the *News*, pictures of the five women jurors taken alone and separated from the seven men jurors, who had their pictures taken in a group.

In the *Press*, December 20th, were pictures of the jury at meals. This was during their deliberations, and on Tuesday, December 21st, picture in the *News* of the jury separated, six in one group and six in the other, also during deliberations. (Petitioner's Ex. 1 on Motion for New Trial.)

A Motion of the Prosecuting Attorney (R. 1618) for the jury to view the home and the grounds of the petitioner was made. The Motion was granted. The jury was brought back and seated in the jury box and were subjected to at least a dozen photographers and television cameramen. They mounted themselves on chairs, the Judge's bench and various parts of the room. All this was done outside the presence of the petitioner, and the petitioner's Exhibits 63, 64, 65, entered on the Motion for change of venue and continuance were introduced to show this situation. (R. 1634.) This occurred about noon on

November 3rd, and the jury was then dismissed for the day. The Court reconvened, with the jury present, on November 4th, for the purpose of being taken to the home of the petitioner.

The Court in this case gave no serious consideration to the terrific situation that was surrounding this petitioner on trial for his life. In fact, he made no effort to control it. On a number of occasions it was necessary for counsel to confer privately with the Court in chambers on points that were in issue in the trial. On such occasions when said conferences were held behind the closed door of the Judge's chamber, there would be a great rush of photographers, reporters, radio and television personnel into the room which adjoined the Judge's chambers. So great was the number that crowded into the room that it was necessary on such occasions for counsel to push their way out so that they could again regain their place in the courtroom. After counsel had secured their exit, then a great number of such persons as described would crowd into the Judge's chamber to inquire as to the purpose of the meeting. (App. B, p. 172a.)

There was constant confusion, distraction and noise caused by the reporters milling around and newspaper, radio and television personnel moving in and out of the courtroom. They were occupying the table inside the bar and the seats just back of the bar. (See App. B, p. 171a.)

An indication of conditions existing during the trial is shown by the following excerpts from the record:

> "The Court: Will you wait just one moment, gentlemen, let's have perfect order until we have these matters disposed of." (R. 531.)
>
> "The Court: Ladies and gentlemen of the panel—let's have quiet, please—We will adjourn until 1:15 this afternoon." (R. 1168.)

"The Court: Just one moment, please, will you folks in the rear be kind enough to be very careful in moving? It just cuts off the speech and makes the situation impossible. We will have to have quiet." (R. 2280.)

"Counsel: I can't hear, your Honor, there is so much noise in this Court room.

The Court: Can we have quiet in the rear, please. We will have to restrict the movements in this court room unless we have quiet. We just cannot continue." (R. 2326.)

"The Court: Before we proceed further, it has been brought to the attention of the Court that some persons have undertaken on their own behalf to examine some of the exhibits in this case. Will all persons be kind enough to be warned now that there is no one to touch the exhibits or get near to them during the progress of this trial other than counsel in the case. Please observe that from now on." (R. 3075.)

"Counsel: Will you allow me to finish my questions before you all laugh. Put it in the record that the audience in the rear, the reporters, television men laugh in this case where a man is on trial for murder for his life." (R. 3276.)

"Mr. Corrigan: Will you put in the record that at this time the audience broke into loud laughter?

Mr. Danaceau: We object to that. There was not any loud laughter.

The Court: Yes, the Court will say it was not loud laughter. Certainly there was some laughter." (R. 4498.)

Mr. Corrigan: Now, let's have some quiet back here, will you, gentlemen?

The Court: Yes, let's have quiet, gentlemen." (R. 4532.)

Mr. Corrigan: Was when? I could not hear you." (R. 4850.)

"Mr. Corrigan: There seems to be so much noise back here, your Honor, people going in and out, the door slamming. Can't we have a little quiet?

The Court: Unless we can have this movement decreased, the court will have to close that door." (R. 6251.)

"Mr. Mahon: May we have an answer?

Mr. Parrino: We can't hear, Doctor.

Mr. Mahon: We can't hear you." (R. 6260.)

"Mr. Corrigan: There is so much noise out there.

The Court: I don't know where it comes from.

Mr. Parrino: It is in the hall, Judge. I will see if I can quiet them down.

Mr. Corrigan: Tell them to be quiet." (R. 6779.)

Due process requires that a trial shall take place in an atmosphere of quiet and dignity, not, as occurred in this case, in the atmosphere of a "Roman Holiday." See *Moore v. Dempsey*, 261 U. S. 86.

Whether a constitutional guaranty has been violated is a question which this court has consistently determined itself by independent examination of the record. *Cassell v. Texas*, 339 U. S. 282; *Haley v. Ohio*, 332 U. S. 596; *Malinski v. New York*, 324 U. S. 401.

The Fourteenth Amendment prohibits the conviction "of one whose trial is offensive to the common fundamentals of fairness and right." *Betz v. Brady*, 316 U. S. 455; *Bockhalter v. New York*, 319 U. S. 427; *Rochin v. California*, 342 U. S. 165; *Illinois v. Hryciuk*, Supreme Ct. Ill. Nov. 18, 1954; 125 N. E. (2d) 61.

> "Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspaper." *Bridges v. California*, 314 U. S. 252, at 271.

The situation of "trial by the press" is so fraught with evil that it is demanding the attention not only of the bench and bar of the United States but all thinking

Americans, including great editors of newspapers, who are apprehensive of the disintegration of constitutional rights.

62 A. B. A. Reports, 853, (1937).

Honorable George H. Boldt, United States District Court, Western District of Washington, before the Judicial Administration Section of the American Bar Association, August 16, 1954.

"The American Lawyer—A Summary of a Survey of the Legal Profession." University of Chicago Press, 1954, pages 277-280.

John D. Pennekamp and the Miami Herald Publishing Co., Petitioners, v. The State of Florida, 328 U. S. 331. See footnotes at Pages 360, 364.

Minnesota Law Review, Vol. 39, No. 4, March, 1955, at Pages 435 & 436.

Rifkind—"When the Press Collides with Justice," 34 *Journal American Judicature Society*, 46 to 49, 1950.

Honorable Thurman Arnold in *Annals of the American Academy of Political and Social Science*, July, 1955, "Due Process and Trials." p. 123.

"Protection of Human Rights Under the United States Constitution." Noel T. Dowling,—*The Annals of the American Academy of Political and Social Science*, January, 1946.

"Newspapers and the Pursuit of Justice"—Jerome H. Springarm, the *Saturday Review*, April 3, 1954.

"The Price of Freedom. We Must Be Vigilant Within the Law," by Right Honorable Lord Justice Demming, *A. B. A. Journal*, Vol. 41, p. 111.

"The Right of Newspapers: May They Print Whatever They Please." Eustace Cullinan, *A. B. A. Journal*, Vol. 41, p. 1020.

Honorable Herbert Brownell, Jr., Address before the Federal Bar Association in Washington, September 24, 1954. "A Fair Trial and a Free Press."

"The Art of Advocacy," Lloyd Paul Stryker, Simon & Schuster, pages 212, 213.

"Conduct of Judges and Lawyers." Honorable Philbrick McCoy, Judge of the Superior Court of California, Los Angeles County, *Journal of the American Judicature Society*, Vol. 7, April, 1954.

Connecticut Bar Journal, Vol. 29, March, 1955, pages 68 & 69.

We believe that the situation presented by this case is not paralleled in American journalism. During the five days and nights of deliberation the jury was in a room that was up one flight, about twenty steps, from the courtroom. The door from this room to the flight of stairs was generally open. During the deliberations the courtroom and corridor outside was filled with curious onlookers, reporters, television and radio commentators and photographers. During this time card games were in progress in the courtroom, groups were visiting, a great number of people milled outside and inside the court, and the courtroom and corridors resounded with laughter, loud talk and noises. The floor of the courtroom and the corridors became stained and dirty and strewn about were papers, cigarette butts, empty cups and various litter.

The conditions in and around the courtroom during the trial and during jury deliberations is shown in the Affidavit of Counsel filed in support of the Motion for New Trial. It is made under the solemn oath of counsel in this case. (App. B, p. 171a.)

III. Petitioner was deprived of due process of law by reason of the ruling of the trial court which prevented petitioner from exercising his last peremptory challenge.

The trial court knowingly disrupted the jury and then prevented the petitioner from exercising his single remaining challenge. After the jury was sworn and

before any alternate jurors were chosen, the State decided that they did not want Juror Manning and thereupon devolved a plan, with the knowledge and assistance of the court, whereby the usefulness of Manning as a juror was destroyed. The Court of Appeals found as follows:

> "The Court, *after knowledge that the State was going to object to Juror Manning*, although then sworn as a juror, proceeded to impanel the alternate juror." (Emphasis added.) (App. A, p. 37.)

On Friday afternoon, October 29th, the jury was excused until Monday, October 31st. The reason for excusing the jury on that Friday afternoon was because the Prosecutors took up with the Judge the qualifications of James R. Manning, who was seated as Juror No. 6. He had previously been sworn with the panel to try this case. The Court was informed by the prosecution that Mr. Manning had not told the truth when he said he not been a witness in a case; that in 1943 he had been arrested on a morals charge and had been fined and sentenced to the workhouse; that his sentence had been suspended. There was no attempt on the part of the prosecutor on Friday to exercise a challenge and the case was continued until Monday, October 31st.

Throughout Friday afternoon, Saturday, Sunday and Monday, the newspapers, radio and television were crowded with stories about James R. Manning. His picture was printed in the papers, and on Monday, November 1st, the Press made the advance announcement that the court would discharge him. The Court was fully cognizant of all that was going on in regard to this particular juror. The Court had been visited by the minister of Mr. Manning, and the Court had read in the paper the fact that he was going to discharge Manning, although up to that time no challenge had been made. It is perfectly ap-

parent that what the prosecutors had decided to do was to allow him to sit until an alternate juror was obtained, and then to challenge Manning, which was what they did.

November 1st, with this situation known to the Court, the Court proceeded to impanel alternate jurors. The first one of the new panel called was Jack W. Hansen, who testified that he had read all about the case in the newspapers, heard it on radio, discussed it at various times; since he received his notice as a prospective juror he had read about it; spoken to other people about it, and they spoke to him; that he was a foreman in a factory, and that opinions were discussed in the factory and at social gatherings and in clubs to which he belonged; opinions were expressed by his mother-in-law, who lives with him; his wife expressed opinions to him; he had read about Susan Hayes, and he was seated as Alternate Juror No. 1, and Lois H. Mancini was seated as Alternate Juror No. 2.

After these jurors were sworn, the Prosecutor made his application that James R. Manning, Juror No. 6, be discharged from the jury.

The court adjourned from November 1st to November 3rd, as November 2nd was Election Day and there was no court session.

The discharge of Mr. Manning by the Court on November 3rd was objected to and after he was discharged, the alternate juror, Hansen, was ordered to take Manning's place.

The motion for change of venue and continuance was overruled, and the jury panel now being refilled by the excusing for cause by the State of Mr. Manning, the defense had one challenge left and challenged Mr. Hansen. This challenge was overruled.

It was called to the attention of the Court that the *Press* on November 1st had carried the headline that the court would excuse Juror Manning.

The basic reasons for the discharge of Manning was not because he was unfit to serve in the case but because of having been arrested a long time before the State concluded that he might, because of that fact, be sympathetic to another person who had been arrested. It would have been a reason to exercise a peremptory challenge, but having passed the peremptory challenge the State adopted the outlined method to get rid of Manning and this indicates that the court in the trial of the case was not acting fairly or impartially but was obviously favoring the prosecution.

IV. Petitioner was deprived of due process of law by the action of the two officers who were placed in charge of the jury after the case had been submitted to the jury and the jury had been sequestered, and who in violation of their oaths permitted the jurors, during their deliberations, to make telephone calls to the outside and engage in conversations over said telephone without the officials in charge knowing what was said to the members of the jury, all without the knowledge or order of the court.

Two men bailiffs were in charge of the jury. They had separate rooms. Edgar Francis, one of the bailiffs, stated that telephone calls were made from his room and from the room of the other bailiff by the jurors. (R. 7083.) No record was made of the calls from his or the other bailiff's room. He had no knowledge of what was said by any of the jurors making calls or to whom they were talking. (R. 7086.)

The majority opinion in the Supreme Court of Ohio seeks to justify this conduct by stating at 165 Ohio St. p. 299:

> "There is * * * every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors' minds as to personal matters

and would make them better, more conscientious jurors."

As is pointed out in the dissenting opinion at 165 Ohio St. pp. 307-308, there is nothing in the record to show that the only thing said to the jurors was an assurance as to the health and welfare of their loved ones. The bailiff testified (R. 7085-6):

"Q. The conversations that you heard were from the side you were on, is that right?

A. That's right. * * *

Q. What it was said back to that juror, you have no knowledge of?

A. No."

The telephone communications with outside parties by members of the jury without the knowledge or consent of the court were in direct violation of Revised Code Section 2945.33, which was enacted specifically to protect a jury from outside influence. The bailiffs who permitted such communications likewise violated their oaths as prescribed by Revised Code Section 2945.32.

The holding of the Supreme Court of Ohio in the case at bar is in conflict with *State v. Adams*, 141 Ohio St. 43; *Farrar v. State*, 2 Ohio St. 54; *Dillon v. State*, 5 Ohio St. 102; *Peart v. Jones*, 159 Ohio St. 137; *Wheaton v. United States*, 1943, 133 F. 2d 522; *Peoples v. Migliore*, 58 N. Y. 2nd 361, 269 App. Div. 96, decided in 1945; *Osborn v. State*, 126 N. W. 737, 143 Wis. 249; *State v. Potter*, 54 N. W. 2d 43 (Supreme Court of Wisconsin, 1952); *State v. Rose*, 262 Pac. 2d 194 (Supreme Court of Washington 1953); *State v. Jones*, 255 S. W. 2d 801 (1953); *State v. Bayliss*, 240 S. W. 2d 114 (1951).

A violation of the statutes here must be presumed to be prejudicial. If lower courts and officials charged with a sacred duty are permitted to violate statutes as in this

instance, then the jury system is shorn of its sacredness and its integrity. When such flagrant violations of law occur, then this court should reverse. It is only by a reversal that our trial courts will have impressed upon them their duty to see to it that officials instructed and appointed by them perform their proper duty as required by law. This is a denial of due process of law. It should be observed that this was an extremely doubtful case. The jury was out five days and nights. The case was blazed across the headlines every day for months. Poisonous, vicious and false broadcasts filled the air and were heard by jurors. It was the topic of conversation at every place where more than one person assembled. There can be no doubt that the persons talking to the jurors mentioned the case. Upsetting conditions at home may have well been brought to the attention of the jurors, which affected their attitude of mind.

V. Petitioner was deprived of due process of law by the action of the authorities in seizing possession of his home immediately after the murder and retaining possession until after he had been tried and convicted, thereby preventing him from discovering evidence essential to his defense.

The petitioner was denied a fair trial by the unlawful act of the authorities in seizing his home immediately after the murder and keeping it in their possession until two days after the jury had returned its verdict, which prevented the petitioner from developing facts essential to his defense.

The record shows that the authorities completed their investigation at the home by August 16, 1954. (R. 4405.) After that date they had no need for the home. On August 23rd petitioner through his attorneys served a formal demand for possession upon the Chief of Police of Bay

Village, who at that time held possession. (R. 2846.) (App. B, p. 169a.) This was refused on instructions from the County Prosecutor. (R. 2848.) After the State rested its case petitioner again demanded possession and was refused. (Bill of exceptions, motion for new trial on ground of newly discovered evidence, p. 72.) Petitioner then endeavored to secure the keys in open court but the court ordered the keys returned to the police. (R. 6070-4.) It was not until after he had been convicted and sentenced that petitioner was able to regain possession.

The result was to deny petitioner the opportunity to properly prepare his defense. The State's case had been based entirely on the theory that petitioner and his son, aged seven, were the only other persons in the house beside the murdered woman; that there was no evidence of any other person being present; that the little boy did not commit the murder, so it must have been the petitioner.

Although the State had possession for five and one-half months its experts had never made any tests of the numerous spots of blood that were splattered on the walls in the bedroom where the murder was committed. It was impossible to have a scientific investigation made, free from interference by the police, until possession was restored to the petitioner.

As soon as possible after securing possession of his home, petitioner retained a nationally known criminologist, Dr. Paul Leland Kirk, a biochemist who was in charge of the Criminalistic Section of the School of Criminology in the University of California. Dr. Kirk is well known for his work in this field and his integrity is beyond question. Dr. Kirk determined that a large spot of blood on the wardrobe door immediately back of where the murderer stood was not the blood of either petitioner or his murdered wife; *that it was the blood of some third person.*

This evidence was vital to the defense. It struck at the very heart of the State's case. It is impossible to overestimate what effect it would have had if the jury could have heard Dr. Kirk testify to what he found. This information, together with other important evidence developed by Dr. Kirk, was set forth in a motion for new trial filed within the time prescribed by law, but the trial court overruled this motion on the ground that petitioner did not use due diligence in discovering the evidence, and that it would not have made any difference in the result anyway.

VI. Petitioner was deprived of due process of law by the action of the Supreme Court of Ohio in admitting the case on constitutional questions herein set forth and then failing to pass upon those questions.

Under Ohio Supreme Court procedure an appeal as of right, setting up a violation of constitutional questions and a motion for leave to appeal may be filed in the same case. That was done in this case and both the motion for leave to appeal and the appeal as of right was sustained. The appellee moved to dismiss the appeal as of right and the motion was overruled, so the Court had before it both the general assignments of error and the claimed violation of the constitutional rights of the petitioner. In order to secure admission to the Supreme Court on a constitutional question it must be one that substantially affected the rights of the petitioner. *Traction Co. v. Cincinnati*, 96 Ohio St. 602. The Supreme Court having admitted the case on the constitutional questions, recognized that the constitutional rights of the petitioner were substantially affected, but the Supreme Court of Ohio did not pass upon the constitutional questions. The court passed on only three of the general assignments of error. Beyond mentioning in the Opinion the surroundings in which the trial

took place, the court made no attempt to determine how such recognized conditions interfered with due process.

The petitioner on six different occasions moved for a change of venue and at the same time moved for a continuance. The Supreme Court in its Opinion (App. A, p. 86) considered only the assignment of error that had to do with the change of venue and had no comment on the applications for continuance or the failure on the part of the trial court to grant such continuance.

By the characterization of the trial as being held in the atmosphere of a "Roman holiday," it follows that the Supreme Court of Ohio concluded that the trial of petitioner fell to the levels of the depraved and barbarous spectacles which took place in the Roman arena. Having made that finding, it dismisses the prejudicial campaigns of the newspapers and the disorderly trial scenes with the observation that Courts and litigants "must have faith in the inherent honesty of our citizens." (App. A, p. 88.)

This failure of the court to pass on twenty-six of the twenty-nine assignments of error is sharply criticized in the dissenting opinion. (App. A, p. 96.)

VII. Petitioner was deprived of due process of law by his appeal to the Supreme Court of Ohio being heard and decided by an illegally constituted court, in that the Chief Justice of the Supreme Court of Ohio disqualified himself from participation in the case and then appointed a judge of a court of appeals to fill the vacancy, instead of the appointment being made by the judge having the longest period of service upon the Supreme Court as required by the Constitution of the State of Ohio.

The record of the proceedings in the Supreme Court of Ohio disclosed that prior to the argument upon the Motion for leave to appeal and upon constitutional ques-

tions, the Chief Justice, Carl V. Weygandt, disqualified himself and withdrew from the case for the reason that his son had participated in the early days of the prosecution of Dr. Sheppard. It then became necessary to appoint a member of a Court of Appeals of Ohio to sit in the place of the vacancy so created. On the hearing of the issues on the merits, Judge Charles W. Montgomery, of the Court of Appeals of the Fifth Appellate District, sat and later deliberated with other members of the court and participated in the final decision and joined with the majority that affirmed the conviction.

The Chief Justice, Carl V. Weygandt, appointed the said Judge, Charles W. Montgomery, to sit with the Court and participate in its deliberations and in the final action of the majority.

"Entered April 11, 1956.

It is ordered by the Court that the journal entry of April 11, 1956, appearing at page 29 in journal number 42, entitled 'Assignment of Judge of the Court of Appeals' be and the same hereby is, vacated and the following assignment is entered as of said date and in lieu thereof:

Assignment of a Judge of Court of Appeals.

Honorable Charles W. Montgomery, a resident Judge of the Court of Appeals of the Fifth Appellate District of Ohio, is hereby assigned to sit on the Supreme Court of Ohio in the place of Chief Justice Carl V. Weygandt in case number 34615, State of Ohio vs. Sheppard, on Tuesday, April 17, 1956, and to continue therein until the Court business on which he enters is completed.

This assignment is made under authority of the constitution and statutes of Ohio.

Carl V. Weygandt,

Chief Justice of Supreme Court of Ohio."

A reading of Article IV, Section 2 in its pertinent part will disclose that such a procedure as that followed in this cause and as above pointed out is not authorized by the Constitution of Ohio but is contrary to the plain and specific language thereof.

Article IV, Section 2, in its pertinent parts provides as follows:

> "* * * If any of said Judges shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the *Chief Justice, or in case of the absence or disability of the Chief Justice*, the Judge having the longest period of service upon that Court, may direct any Judge of any Court of Appeals to sit with the Judges of the Supreme Court in the place and stead of the absent Judge." (Italics ours.)

The Chief Justice disqualified himself. He voluntarily placed himself under a disability. He absented himself from the hearing. It would appear that he was not authorized by the constitution to appoint a member of the Court of Appeals to sit on the Supreme Court in the absence so created. The only procedure authorized by the Constitution is that authorizing "the Judge having the longest period of service upon that Court, may direct any Judge of any Court of Appeals to sit * * *." The Chief Justice was without constitutional authority to appoint Judge Montgomery.

The constitution is the basic foundation of our whole judicial system. This Court draws its power and its authority from the constitution. The members of the Court as constituted and who affirmed the conviction had no authority in the constitution to hear or determine the issues involved.

The procedure followed as herein set out certainly does not accord to the petitioner "due process of law."

CONCLUSION.

In the case of *State of Maryland, Petitioner, v. Baltimore Radio Show, etc.*, 338 U. S. 912, Mr. Justice Frankfurter in an opinion respecting the denial of the petition for a writ of certiorari, attaches to that opinion an appendix of English decisions concerning contempt of court for comments prejudicial to the fair administration of justice so as to indicate "the kind of questions that would have to be faced were we called upon to pass on the limits that the Fourteenth Amendment places upon the bar of the states to safeguard the fair administration of criminal justice by jury trial from mutilation or distortion by extraneous influences."

We believe that this case brings squarely before the Court the widely debated question of "fair trial and free press."

In *United States ex rel. David Darcy, Petitioner, vs. Earl D. Handy, Warden, etc.*, 351 U. S. 454 (decided June 1, 1956), it was not questioned that the petitioner had participated in a robbery wherein a citizen was murdered. Darcy also had a bad criminal record. In the case at bar, the petitioner had no previous criminal record whatsoever.

Burton, *J.*, speaking for the majority in the *Darcy* case observes that the jury during the trial was kept together under the supervision of Court officials. "The jurors were not permitted to see newspapers, listen to radios, or see television programs, and were kept free from any outside influence or contact." The reverse was true in the case at bar. In the *Sheppard* case during nine weeks of trial the jurors were permitted to go to their homes and any other place dictated by their fancy and listen to the radio comments relative to the trial and had full opportunity to read the newspapers and the scurrilous, false statements made about the petitioner here.

In the *Darcy* case the courtroom was not filled to capacity at any time during the trial and there was no need for the Court at any time to call for order. In the case at bar at every session the courtroom was jammed to capacity and people were standing close together filling every available space not actually used by the Court and the participants in the trial.

In the *Darcy* case there were no outbursts, disturbances or untoward incidents. In the case at bar there was confusion, noise and disorder which at times got beyond the control of the Court. Such confusion not only occurred in the courtroom but in the hall outside and throughout the courtroom floor.

There the reporting was factual; here the news media carried as reports material which was in many instances absolutely false (some of which the record discloses was heard by some of the jurors) and all members of the jury, with but one exception, had read about the case in the local newspapers in advance of the trial—newspapers which carried false statements in some instances, half-truths in others, distortion of facts in others and all tending to create hysteria and to direct the aggregate mind of the community against the petitioner. There the news coverage diminished a few weeks after the robbery, increased and subsided again at the grand jury proceedings and increased just before the trial. Here the sensational, hysteria provoking, and derogatory newspaper and radio reports continued unabated from July 4, 1954, until the conclusion of the trial of the petitioner. Front pages with glaring headlines, together with prejudice creating cartoons, were devoted almost in their entirety to the *Sheppard* case.

In the *Darcy* case, as pointed out in the majority opinion:

"No question was raised as to the identity or as to petitioner's participation in the robbery."

Here the evidence was all circumstantial. The dissenting opinion in the Ohio Supreme Court points out two of the circumstances which indicate almost positively the innocence of the petitioner. Although we recognize that it is the duty of the State Courts to assess the evidence, yet in this comparison it might well be observed that the murdered woman's blood had spattered all over the walls, doors and furnishings in small droplets and certainly the clothes of the murderer would have been sprayed with her blood and would have shown many *small drops* of blood, yet there were no such small drops of blood on petitioner's trousers and in fact no blood at all except for one *large smear* of blood on the knee "which could have gotten there when he discovered his wife after she had been killed, because the knee was at about the height of the bed which was covered with her blood." (Taft, J., 165 O. S. 307.) On the day following the murder two small pieces of leather were found under the bed of the victim. Police compared these two small pieces of leather with all leather goods in the home as well as the wearing apparel of the petitioner and admitted that these two small pieces of leather did not come from the petitioner or any place in the petitioner's home. The victim resisted most vigorously and violently. All agree on that. One of her fingernails was practically torn from her finger. Under her fingernails was found material that could not be traced to the petitioner. It was conceded that two types of blood, one being the victim's and the other unidentified, were found on the victim's wrist watch which was torn from her hand. Dr. Kirk's affidavit which was discarded by the Ohio courts disclosed that an analysis of blood on the

walls of the victim's room established that such blood was neither the victim's nor the petitioner's, but was that of a third person.

These circumstances are pointed out—*undisputed and uncontradicted*—as they eliminate speculation and demonstrate the reality that the vicious and studied campaign of abuse and falsity leveled at petitioner for months affected the jury

In the *Darcy* case counsel did not "seek a continuance of the trial or a change of venue." In the case at bar such motions were filed prior to the commencement of the trial and were renewed frequently throughout the entire trial but were denied by the trial court. Under Ohio law only six peremptory challenges are permitted the defendant in a felony case. Petitioner used five of these peremptory challenges and endeavored to use the sixth but it was not recognized by reason of a technicality occurring at the trial.

It appears that Darcy's trial was conducted in a calm, deliberate, undisturbed atmosphere. In the case at bar, as stated in the opening paragraph of the majority opinion of the Supreme Court of Ohio, the trial took place in the atmosphere of a Roman holiday for the news media. Here "circulation-conscious editors" (Appendix A, p. 86), commercially sponsored television and radio seized upon the trial of the petitioner to realize commercial gains out of a trial in the administration of justice.

The entire record of this case, supported by the conclusion reached by the Supreme Court of Ohio that it was conducted in the atmosphere of a Roman holiday, meets the test laid down by this Court in the *Darcy* case, that there is present "a demonstrable reality" that petitioner did not receive a fair trial and was the victim of an injustice.

In *Frank vs. Mangun,* 237 U. S. 309, it was held that if the public passion is so great as to be irresistible by normal human beings serving as jurors, such proceeding is a "sham" and due process of law is denied.

The trial was infected with prejudice, but the protection afforded by law to an accused, to-wit, change of venue, continuance and peremptory challenge, was denied the petitioner.

This Court held in *United States ex rel. Darcy vs. Handy, supra,* that the burden of showing the essential unfairness, violative of constitutional rights, is on the petitioner and the burden must be sustained not as a matter of speculation but as a demonstrable reality. We have attached hereto an extensive Appendix B to comply with this ruling, but even this will give only a faint idea of the adverse effect of the tremendous publicity. Almost without exception the headlines covered the front page in the local newspapers and the most prominent parts of the front page were devoted to the case. During much of the investigation and trial many more pages of each edition were filled with material on the *Sheppard* case. In order to get any adequate conception of the extent and type of coverage, it is necessary to go through the four volumes of clippings which petitioner introduced as his Exhibits 1 and 2 in support of the motion for change of venue and as Exhibit 1 in support of his motion for new trial. We realize that this involves a tremendous amount of work, but we respectfully request the Court to examine these exhibits for they show a horrible example of trial by newspaper.

For the reasons set forth above, we request the Court to grant a Writ of Certiorari.

Respectfully submitted,

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35/28

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 352.

SAMUEL H. SHEPPARD,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OBJECTIONS TO JURISDICTION.

The State court has not decided a federal question of substance not theretofore determined by this Court, nor has the State court decided any question in a way not in accord with applicable decisions of this Court. No real nor substantial federal question is involved herein.

The claims of petitioner that he was denied his constitutional rights are based entirely on faulty assumptions or wild assertions, or on misstatements made pertaining to the proceedings and to the evidence. When the same misstatements were made on the motion for new trial, the trial court found it necessary to state:

> "The court has deemed this memorandum necessary due to some statements made by counsel for the defense during trial and repeated or enlarged in said motion. Some are not factually true and some others

create or tend to create impressions not representative of the true situation." (Pet. App., pp. 1a-2a.)

We readily concede that there was widespread publicity, all of which was noted by the trial and reviewing courts. But the claims that either the jury or judge were influenced in the trial of the case by news media or by anything other than the evidence received in open court are groundless and unsupported by the record. And a fair and objective examination of the record will disclose that the news media did not slant their stories to prejudice or to convict the petitioner.

Counsel for the petitioner refer to certain newspaper articles and headlines which were later submitted as Exhibit No. 1 on the motion for new trial. Neither the newspapers nor the headlines were evidence in the trial of the case and counsel's assertion that during the trial the jury were reading these newspapers is nowhere supported in the record. In various places in the petitioner's brief, reference is made to newspaper articles and headlines, none of which were received in evidence on the trial of this cause. The fact that they were offered and received in evidence before and after trial on the various motions made by counsel for the petitioner does not make them evidence considered by the jury in the trial.

Of a certainty, there is in the record no proof, no "demonstrable reality" that either the jury or the judge were influenced in the trial of this case by anything except the evidence presented in open court and the law applicable thereto. The petitioner was tried by a fair and impartial jury who were properly instructed at all times by the court and rendered their verdict after careful and conscientious deliberations. The petitioner was fairly tried and properly convicted.

Counsel for the petitioner not only conducted a searching voir dire examination, and did not exhaust his peremptory challenges, but stated to the jury in argument:

> "May I take this opportunity—as I started to say, may I take this opportunity to congratulate you on the splendid attention, the tireless effort you have displayed during these nine weeks. You have been deprived, probably, of many comforts that you ordinarily enjoyed in and around your home with your family because of the admonitions that you have received throughout the trial by his Honor, Judge Blythin.
>
> "The purpose, ladies and gentlemen, of those admonitions was that we could come to this point in the lawsuit where your minds would be free, your minds would be open, and that you could take into consideration all the facts and all the testimony that has been submitted to you *without any outside influence*, and I am sure, and I say this to you sincerely, because I have had the opportunity of observation during this entire period, *that you have done just that*." (R. 5371-72.)*

During the impaneling of the jury, the progress of the trial, the instructions of the court and the summations of the attorneys, the jurors were repeatedly told that this cause was to be decided solely on the basis of the evidence presented in open court and on the law given them by the judge, and on nothing else. Each juror agreed that he or she would disregard everything other than the evidence and would, in conformity with the instructions of the court, render a fair and impartial verdict. It is to be noted that a fair and impartial jury was impaneled and that the defense did not exhaust their peremptory challenges. The jurors took the oath required by law and there is not a

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* Typewritten record. Original Bill of Exceptions filed in Washington.

shred of evidence in the record that each and every juror did not fully and completely abide by the oath so taken.

There is not a particle of evidence in the record to show that the jury was in any way influenced by reports or stories in newspapers, over the radio, or on television; or that the jury or any juror was biased or prejudiced by any such stories or broadcasts.

The laws of the State of Ohio provide for a motion for new trial and upon the hearing of that motion, the affidavits and testimony of the jurors may be received. *Emmert v. State*, 127 O. S. 235; *State v. Joseph*, 90 O. A. 433. Although several jurors were subpoenaed and were thoroughly interrogated by defense counsel on the hearing on the motion for new trial, not a word of testimony was produced to justify the defense claim that the jurors were influenced by anything other than the evidence produced in open court in reaching their verdict. The claim that they were influenced by news stories or any other outside influence is merely the assertion of counsel. It is not supported by the record.

The trial and proceedings on review were had in accordance with the provisions of the statutes and Constitution of the State of Ohio and in full conformance with the provisions of the Federal Constitution.

STATEMENT OF THE CASE.

The extraordinary excursions in petitioner's brief to newspaper stories and editorials published before, during and after the trial, as though they were before the jury as evidence in the case, and the omission by the petitioner of almost all of the pertinent evidence presented by the State in this case, necessitates our directing the attention of this Court to an objective statement of much of the evidence as set forth in the opinion of the Court of Appeals of Cuyahoga County, appearing at pages 41a to 67a of the Appendix to the Petition.

The State proved by direct and circumstantial evidence that Marilyn Sheppard was brutally murdered in her bedroom sometime between 3 and 4 A. M. on the morning of July 4, 1954; that at the time she was murdered the only person in that home, except a six year old son, was her husband, the petitioner. It was conclusive from the evidence that there was a simulated burglary and that nobody but the petitioner had the time and the opportunity to fake such a burglary to divert suspicion from himself. The fantastic stories told by the petitioner were so unreasonable and absurd as to be, in the opinion of the jury, unworthy of credence.

After giving "a summary of much of the evidence dealing with many of the physical facts and conditions of the premises as found on July 4th and of the declarations and actions of the parties involved as testified to by the public authorities and other witnesses, together with what the defendant said to others and in his testimony upon trial in relation to the events of the morning" (66a of the Appendix to the Petition), the Court of Appeals then continued:

"The testimony of the defendant, in dealing with the events that took place in his presence or the things that he did, was characterized by the State as vague, indefinite, uncertain or factually highly improbable. During the time he was under cross-examination the defendant gave evasive answers such as 'I can't recall' or 'I can't remember,' approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence material to the issues in the case.

"The jury, under the instruction of the court, was presented with but one question or issue of fact and that was, had the State shown beyond reasonable doubt that the defendant purposely killed Marilyn Sheppard?

"The State's case is based in part on circumstantial evidence. The law of Ohio on this subject requires that the facts and circumstances upon which the theory of guilt is based must be established beyond reasonable doubt and the facts so established must be entirely irreconcilable with any claim or theory of innocence and admit of no other hypothesis than the guilt of the accused. *Carter vs. State*, 4 Oh. App. 193.

"If, therefore, the jury, after careful deliberation, found that there was any possible hypothesis of innocence, after a consideration of all of the evidence, then the defendant would be legally entitled to be discharged, but if the jury found, after full deliberation, there was no possible hypothesis of innocence based on the facts as they found them to be and that the facts found are such as to be irreconcilable with any other reasonable hypothesis, than the guilt of the accused, then a verdict was required.

"This was a jury question and *we hold that there was sufficient evidence to support the verdict of guilty as found by the jury.*" (Appendix to the Petition 66a-67a.)

ARGUMENT.

PUBLICITY DID NOT DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS.

I and II.

Publicity did not prevent the petitioner from having a fair trial.

No matter when or where tried, the Sheppard case would have attracted widespread publicity. This was inherent in the very nature of the case itself. The right to grant a change of venue lies in the sound discretion of the trial court. The trial court stated on the motion for new trial in ruling on the denial of the motion for change of venue and for a continuance:

> "(3) Denial of change of venue requested by defendant. The request, when made, was based upon the claim that the extraordinary public attention centered upon the case in this county by the various media of news made the securing of a fair and impartial jury in this county impossible. It is a matter of common knowledge that the case commanded that same attention throughout Ohio and the United States of America. It commanded very much attention throughout the free world. Chief counsel for the defense conceded and asserted this to be a fact and stated fervently that the defendant could not have a fair trial in Ohio, or even in the United States. The only conclusion from that assertion must be that the defendant cannot be tried at all on an indictment for Murder in the First Degree. Such a claim furnishes its own answer.
>
> "Seldom indeed has there been a case about which the average citizen was so confused by the published stories, or more uncertain about what the facts actually were. With present-day means of communica-

tion the same precise stories were simultaneously published in every city and county in the State and it certainly will not be denied that Cuyahoga County is the most liberal county in the State and, as a result, the best in which to conduct a trial involving a much publicized charge of crime, whatever its nature. *It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like, was involved —what actually was involved was a mere mystery— a 'whodunit.'* The only safe and sure way to determine whether a fair and impartial jury can be secured is to proceed to impanel one. The court reserved ruling on the motion pending such an effort and became convinced, and is still convinced, that an intelligent, sincere, patriotic and fair jury was impaneled. Upon that being accomplished the court overruled the motion and believes such action was not error. Section 2945.06 Revised Code of Ohio provides that a person charged in a case such as this may waive trial by jury and elect to be tried by a panel of three judges. While not challenging the right of a defendant, in a proper case, to a change of venue it does seem that the lack of confidence in any jury anywhere, coupled with the failure to elect to be tried by a panel of three judges, smacks of objection to any trial at all.

"(4) Error in denying application for continuance. The crime charged in the indictment occurred on July 4. Trial started October 18. Defendant's counsel had been engaged and active from a time within hours following the crime and long before defendant's arrest. Seventy-five prospective jurors had been summoned with full knowledge of all counsel long before any application for continuance was filed. The only ground stated for a continuance was 'to permit the extraordinary publicity to quiet down.' It was not claimed that counsel were not prepared for trial nor was any sug-

gestion made as to who was going to 'quiet down' the publicity, nor when nor how." (Pet. App. pp. 2a-4a.)

In the opinion of the Supreme Court of Ohio, Judge Bell stated:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." (Pet. App., pp. 85a-86a.)

The reference by the Ohio Supreme Court to the words "Roman holiday" merely describes the widespread publicity furnished by the news media to the public at large and had no reference to the conduct of the trial itself, nor to the proceedings in the courtroom. The expression is also used to mean a "good time" or "field day." It by no means follows that the news media slanted the news or even tried to do so to prejudice or to convict the petitioner. As clearly indicated by Judge Bell in his opinion, it was a case involving "murder and mystery, society, sex and suspense." The curiosity of the public, excessive though it may have been, necessarily brought about the widespread publicity. The news media were interested in stories for the public and cared not whether such stories favored the State or the defense. A fair and objective analysis of their

stories to the public will disclose that they made no effort to slant the stories, certainly not to influence the jury in arriving at their verdict.

The defense have submitted a wholly distorted picture of the arrangements made by the court before trial to govern the news media which were to "cover" the trial. (Pet. Br. pp. 38-40.) (Pet. App. pp. 171a-172a.) For a fair and objective statement pertaining to such arrangements, we direct the attention of this Court to the words of the trial judge in his memorandum on the motion for new trial.

Regardless of what action was taken by the trial court, it was certain that all of these newspaper reporters were to be present and that demands would inevitably be made upon the trial court by all types of news media. The trial Judge stated, in ruling upon the motion for new trial:

> "Realizing that the case had caught the public imagination to an extent leading national and, indeed, international news media to decide to fully 'cover' the trial, and having requests for space from many of them, the Court decided to make proper arrangements before trial and to control the situation so as to minimize and, if possible, eliminate confusion during the trial. The court room is small.
>
> "The Court assigned specific seats to individual correspondents in the rear of the court room and back of the trial area, and issued orders that there was to be no crowding or congregating at the front end entrances (one on each side of the bench) of the court room; that there was to be no passing back and forth through the trial area and that all entries to and movings out of the court room be via the public doorway in the rear of the court room. Members of the defendant's family were accommodated with seats at all times during the trial. The same was accorded

members of the family of the murdered Marilyn. Members of the general public were admitted to the extent of the seating capacity of the court room and a scheme of rotation was established so that many persons attended some sessions of the trial and no favored members of the general public were present at all times, nor permitted to be.

"Rules were prescribed for photographers and representatives of radio and television stations. They were cautioned that no cameras were to be permitted in the court room excepting in the morning before the convening of court and at the close of the day after adjournment, and that in no event were pictures of the defendant to be taken in the court room at any time excepting with his consent or that of his counsel. * *

"The Court's arrangements and orders were carried out with one or two simple insignificant exceptions, due to overenthusiasm. The defendant and his chief counsel were far more gracious to the press, photographers and gallery than was the Court. A very large number of pictures of the defendant, his family, counsel and friends were taken in the court room (outside of court session periods) with their permission and without complaint. Counsel for the defense held press conferences in the court room with cameras clicking; all to the apparent delight of counsel for the defense, and, naturally, without protest.

"Julian Wilson, a photographer for the Associated Press, testified on this point at the hearing had on the motion and supplemental motion. His testimony stands wholly unchallenged and it states the procedure followed with perfect clarity.

"Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special im-

portance when undertaking a signal public service. Not a single complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or the defendant, but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest.

"Some space outside of the court room which could be spared for the moment without interference with the public service was used by publicity agencies for their typewriters and other equipment but it is definitely not true, as stated in the motion herein, that:

'The Assignment Room, where cases are assigned for other causes to court rooms, was assigned by the Court to reporters and telegraphers.'

"Some generally unused space in the Assignment Room was so assigned. Neither person, record, nor piece of equipment in the Assignment Room was moved, removed or displaced and the Assignment Room functioned normally throughout the entire period of the trial of this cause. One of the real purposes of assigning that space to the uses mentioned was to remove them entirely from the immediate court room area. They were out of the corridors leading to the court room and permitted free movement of the public and visitors within the building, whether there in connection with this case or otherwise, wholly unaffected by the Assignment Room space activity." (Pet. App., pp. 7a-9a.)

It is pertinent to ask: What caused the publicity, and who brought it about?

Marilyn Sheppard was murdered—there could be no doubt about that—and it became the duty of law enforce-

ment officers to thoroughly investigate and to bring to justice the person who murdered her. A protective shield was immediately thrown around the petitioner. The officials of Bay Village, close personal friends of the petitioner who was their police surgeon, sat on their hands and were getting nowhere. It was inevitable that there would be publicity concerning the petitioner's unwillingness to be interrogated, save on his own terms and conditions, and that the public officials would be criticized, such criticism of public officials not being the exclusive prerogative of defense counsel. These incidents occurred in July and the trial did not begin until the 18th of October.

There was no assurance that the publicity would not continue if a motion for a continuance was granted. Further, the trial court was not required to speculate as to whether a trial at a later date would result in more or less publicity. The Constitution provides that the defendant in a criminal case is entitled to a speedy and public trial. As it was, the petitioner was not brought to trial until three and a half months after the crime was committed, and the trial court was not required, in view of the Constitutional provision, to delay the trial indefinitely, otherwise the petitioner could be heard to complain that his constitutional right to a speedy and public trial was violated.

It is not within our province to explain or defend anything that appears in any newspaper, favorable or unfavorable. That there was a tremendous amount of interest in this case, not only throughout our own community, but throughout the state and nation, and in other parts of the world, is not in dispute. It does not follow, however, from the mere fact that this murder mystery fascinated so many people, that the petitioner was prevented from having a fair trial or that any of the petitioner's constitutional rights were violated.

Petitioner has seen fit to set forth what purport to be newspaper headlines. (Pet. Br. pp. 20, 21.) Selected were certain headlines, which, by and large, merely reflected the great interest of the public in the murder mystery and, of course, deliberately omitted were particular headlines that tend to contradict his assertions. Petitioner does not set forth the headline on the front page story in the Cleveland News of July 9, 1954, by Severino P. Severino, News Staff Writer, who, as he states, was granted permission to question Dr. Sam in the presence of his father, Dr. Richard A. Sheppard, and his attorneys, William J. Corrigan and Arthur Petersilge. The headline in large type reads:

"EXCLUSIVE! 'I LOVED MY WIFE—SHE LOVED ME,' SHEPPARD TELLS NEWS REPORTER."

Nor does he list the headline in the Cleveland Press of August 18, 1954, reading:

"DR. SAM WRITES HIS OWN STORY."

Under the headline appeared the text of a statement by Dr. Samuel H. Sheppard, furnished the Press by a member of his family, and above the headline is an enlarged photograph of the last paragraph of the statement, followed by the signature of the petitioner, and reading:

"I AM NOT GUILTY OF THE MURDER OF MY WIFE, MARILYN. HOW COULD I, WHO HAVE BEEN TRAINED TO HELP PEOPLE AND DEVOTED MY LIFE TO SAVING LIFE, COMMIT SUCH A TERRIBLE AND REVOLTING CRIME?"

Nor does petitioner list the headlines of the statements issued by Attorneys William J. Corrigan and Fred W. Garmone, such as the one appearing in the Cleveland Press of August 27, 1954, reading:

"SHEPPARD LAWYERS HIT STORIES ON MURDER"

followed by the text of the long statement so issued.

The defense also might have included other headlines as follows:

July 8, 1954, The Cleveland Press:

"DR. SHEPPARD'S STATEMENT ISSUED TO ANSWER GOSSIP"

July 8, 1954, The Cleveland Plain Dealer:

"BAY DOCTOR TALKS TO REPORTER"

July 8, 1954, The Cleveland Press:

"HUSBAND PUTS $10,000 UP FOR SLAYER"

July 9, 1954, The Cleveland Plain Dealer:

"TEXT OF DOCTOR'S STATEMENT ON HIS OFFER OF REWARD"

July 9, 1954, The Cleveland Plain Dealer:

"DOCTOR WILL HELP IN HUNT FOR DEATH WEAPON TODAY"

July 10, 1954, The Cleveland News:

"HONORED ATHLETE AT HEIGHTS HIGH"

July 12, 1954, The Cleveland Press:

"DR. SHEPPARD RETURNS TO BAY VIEW HOSPITAL TO TREAT HIS PATIENTS"

July 15, 1954, The Cleveland News:

"DRUNK 'CONFESSES' BUT STORY FIZZLES"

July 17, 1954, The Cleveland Press:

"DR. SHEPPARD TELLS PRESS 'KILLER WILL BE CAUGHT' "

(Then follows responses to 11 questions.)

July 31, 1954, The Cleveland Press:

"TEXT OF STATEMENT BY CORRIGAN AFTER ARREST OF CLIENT, DR. SAM"

July 31, 1954, The Cleveland News:

"POLICE CORDIAL, POLITE AS THEY TAKE SHEPPARD"

August 13, 1954, The Cleveland Plain Dealer:

"FAMILY POINTS TO BAY MAN AS NEW SUSPECT AS HOVERSTEN TALKS"

August 19, 1954, The Cleveland Press:

"DR. SAM IS ANXIOUS TO TAKE STAND, HIS BROTHER SAYS"

September 14, 1954, The Cleveland News:

"BATTLES PROWLER IN BAY. CORRIGAN LINKS BOY'S STORY WITH SHEPPARD CASE"

September 17, 1954, The Cleveland News:

"DR. STEVE HITS 'RED HERRING' ACCUSATION"

October 19, 1954, The Cleveland Press:

"WRITER FINDS DR. SAM'S LOOKS BIG ASSET FOR ACTOR CORRIGAN"

October 21, 1954, The Cleveland Press:

"DR. SAM JUST LIKE A BROTHER, 2 SISTERS-IN-LAW SAY AT TRIAL"

October 22, 1954, The Cleveland Plain Dealer:

"CORRIGAN RATED SECOND DARROW"

October 25, 1954, The Cleveland Plain Dealer:

" 'OTHER SIDE' OF CORRIGAN LIES IN POETRY"

(With picture of W. J. Corrigan and his writer daughter.)

October 26, 1954, The Cleveland Plain Dealer:

"COURT PSYCHOLOGISTS SEE TRIAL CROWD AS NORMALLY CURIOUS"

October 26, The Cleveland Press:

"SAM, WOMAN JUROR SOB IN COURT"

October 27, 1954, The Cleveland Press:

"CITY CHEMIST AIDS DEFENSE OF DR. SAM"

October 28, 1954, The Cleveland Press:

"JUROR OUT, ADMITS SHE WAS FOR SAM"

November 4, 1954, The Cleveland News:

"LETTERS WRITTEN IN JAIL BARE SHEPPARD FEELINGS"

November 5, 1954, The Cleveland Press:

"DR. SAM SAYS AUTOPSY BUNGLED"

November 9, 1954, The Cleveland Plain Dealer:

"CORRIGAN MUSES ON TRIAL'S DRAMA"

November 10, 1954, The Cleveland Press:

"GARMONE QUIZZING WILTS MAYOR HOUK"

November 11, 1954, The Cleveland News:

"HOUKS HELP DR. SAM AS MUCH AS THEY HURT"

November 11, 1954, The Cleveland News:

"DEATH HOME OPENED TO DR. SAM'S KIN"

November 13, 1954, The Cleveland News:

"CORRIGAN'S STRATEGY SCORES"

November 15, 1954, The Cleveland News:

"CORRIGAN HAMMERS AT DRENKHAN"

November 16, 1954, The Cleveland News:

"CORONER IS VILLAIN OF CORRIGAN PIECE"

November 17, 1954, The Cleveland News:

"DR. STEVE HITS PRINT THEORY; SAYS BLOOD FLOWED INTO FOLD"

November 17, 1954, The Cleveland Press:
"DR. SAM WRITES TO HIS SON"
(Photo of Letter.)

November 18, 1954, The Cleveland News:
"DR. SAM DISPLAYS NO-WEAPON THEORY"
(With picture demonstration.)

November 19, 1954, The Cleveland Plain Dealer:
"DR. STEVE'S TIP IS EX-PATIENT"

November 19, 1954, The Cleveland News:
"ORDERED HOVERSTEN OUT, DR. STEVE SAYS"

November 19, 1954, The Cleveland Press:
"SEEK STEVE'S 'SUSPECT' IN DETROIT"

November 20, 1954, The Cleveland Press:
"SCHOTTKE AIDED SAM: DR. STEVE"

November 22, 1954, The Cleveland Plain Dealer:
"PROBE NEW BAY TIP; DETROIT MAN CLEAR"

November 22, 1954, The Cleveland News:
"SLAYING 'SUSPECT' IS WRITTEN OFF"

December 2, 1954, The Cleveland News:
"EVIDENCE CHANGED: DR. STEVE"

December 4, 1954, The Cleveland News:
"CHIP PAYS CALL ON STORE SANTA"

December 7, 1954, The Cleveland News:
"DR. SAM THANKS REPORTER"

During the trial most of the publicity was given out by the defense. As a former newspaper man, defense counsel knew very well how to get favorable stories in the public press, and he was quite successful. He held press

conferences daily, and frequently more than once each day; and, with his client, posed for hundreds of pictures which, together with favorable personal stories, appeared in all types of news media. The amount of publicity so put out by the defense was enormous, and far outshadowed the attention given the State. Defense counsel found that by continually denouncing the newspapers and public officials, he could get an even greater amount of publicity. Mr. Corrigan's skill in the art of publicity is demonstrated by the innumerable stories that appeared, emanating from the petitioner, his counsel, his relatives and his friends. Dr. Steve Sheppard, petitioner's brother, and a prospective witness, so persisted in trying to have the petitioner's case tried in the newspapers that the trial court was required to admonish him that if he did not desist he, being a witness, would be excluded from the courtroom. The bales of newspapers offered by the defense in support of their motions show these favorable personal stories and the innumerable photographs for which the petitioner and his counsel posed.

Mr. Corrigan also demonstrated his accomplishments as an actor by pretending to object to the pictures and reading his objection into the record. The photographs themselves, and the stories which accompanied them, show complete acquiescence and pleasure. That the objection made for the record was without justification and mere pretense is proved by the testimony of Julian Wilson during the hearing on the motion for new trial. Mr. Wilson was a photographer for the Associated Press, assigned to this trial, and testified that he made many pictures of Dr. Sam Sheppard and considerably over a hundred of Mr. Corrigan (R. 7088). His testimony speaks for itself:

> "Q. Now, did you take any pictures in this court room while the court was in session?
>
> A. No, sir, I did not.

Q. Now, while the court was not in session, during recess or after adjournment, did you take pictures in this court room and around this building?

A. Many times.

Q. Did you take pictures of Mr. Corrigan?

A. Yes, sir.

Q. About how many times?

A. Roughly—it would run considerably over a hundred negatives.

Q. About a hundred negatives. And of Dr. Sam Sheppard?

A. I made many pictures of him.

Q. And Mr. Garmone?

A. He, too, I have made many pictures of.

Q. Now, did Mr. Corrigan ever object to your taking of any of these pictures?

A. A few times he has objected.

Q. When was that?

A. About the middle of the trial or towards the end of it, Mr. Corrigan—we were instructed that Mr. Corrigan didn't want any pictures made of himself, the defense, or the defendant.

Q. How many pictures had you taken without his objection before you received those instructions?

A. Oh, many.

Q. More than 50?

A. I'd think so.

Q. And after you received the instructions, did you stop taking pictures?

A. Yes, sir.

O. And how long did that continue?

A. About a week and a half, two weeks.

Q. Then what occurred?

A. We asked Mr. Corrigan's permission.

Q. And did you get it?

A. Yes, sir.

Q. And then resumed taking pictures?

A. Yes.

Q. How many pictures did you resume taking—did you take after you resumed taking those pictures?

A. I'd say not as many as before because we didn't need as many pictures.

Q. More than 20 or 25?

A. About that.

Q. Now, with respect to the defendant, Dr. Sam Sheppard, is the number of pictures that you took before the objection by Mr. Corrigan about the same as what you took of Mr. Corrigan?

A. About, yes.

Q. You took about 50 before. Then there was this period when you didn't take any pictures because of the objection, is that correct?

A. That's true, sir.

Q. And then did you later resume?

A. Yes, sir.

Q. With whose permission?

A. Well, when we got Mr. Corrigan's permission, we resumed taking pictures.

Q. And about how many did you take after you got permission?

A. Somewhere around 15, 20, 25.

* * * * *

Q. Did you ever take a picture of either Dr. Sam Sheppard or any of his counsel over their objection?

A. No, sir.

* * * * *

The Court: May I have just one question? Were you present at the conference which the Court had with photographers prior to the opening of the case?

The Witness: Yes, sir, I was.

The Court: And at which the Court stated what the rule would be as to taking pictures during the trial?

The Witness: I was.

The Court: Do you recall what that was as to taking pictures within the court room and of the defendant and his counsel?

The Witness: Yes, I do recall.

The Court: All right. State it.

The Witness: Your ruling, sir, was that no pictures would be made at any time when the court was in session, and you also requested that we make no pictures of the defendant or the defense or anyone without their permission. I believe that is the gist of the thing.

The Court: That's correct.' (R. 7087-7091.)

It is obvious from the record that Mr. Corrigan's objections, if any, were quite pro forma and mere pretense.

Counsel for the petitioner applied for a continuance of the trial to "permit the extraordinary publicity to quiet down." The trial did not start until October 18th and counsel for the petitioner had been engaged in the case within hours following the crime on the 4th of July. It was not claimed that they were not prepared for trial and, as the Trial Court stated: "nor was any suggestion made as to who was going to quiet down the publicity, nor when, nor how." (Pet. App. p. 4a.) This application was therefore properly overruled.

There is no question but that there was a great deal of public interest in this case. It should not be necessary to point out that newspapers have a constitutional right to report events in the community and to criticize what appears to them to be laxity on the part of public officials. Defense counsel have seen fit to devote a considerable portion of their brief to criticism of public officials; surely, the newspapers have an equal right. The Trial Court put it very succinctly when he stated in ruling upon the motion for new trial:

"It is to be noted that not a single person or agency connected with the investigation of, or prosecution, for the crime involved escapes the anathema of the defense. These include the police, the Coroner, his assistants, the prosecuting attorney and his aides, the State's witnesses, the Grand Jury, its foreman, the trial jury, the public, the bailiffs and the Court. The sense of search for truth and the declaration of justice seems to have vanished from a whole community as if by magic and overnight.

The news agencies of every kind and character are thrown in for good measure. In spite of all the charges made, not a single specific item is cited in support of the claims made. Only broad generalities are indulged in. Reviewing courts will, we hope, have the duty of passing on all the legal questions involved and appearing on the record, and unless it is shown in very clear fashion that some extrinsic forces plowed through the effort to grant the defendant a fair trial, and succeeded in disrupting that effort, it is fair to assume that none did." (Pet. App. pp. 15a-16a.)

There is a comparatively recent decision of the Supreme Court of the United States which states succinctly the right of the people. In *Craig v. Harney*, 331 U. S. 367, 374, the Court said:

"A trial is a public event. What transpires in the courtroom is public property * * * Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government to suppress, edit or censor events which transpire in proceedings before it."

The right of the people in this respect was recognized more recently in the opinion of Mr. Justice Frankfurter, in *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 920:

"One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."

The only question with respect to the motion for change of venue was, could a fair and impartial jury be impaneled in this community, where the offense occurred? The question was answered by the impaneling of the jury. A fair and impartial jury was impaneled, even though the defense did not exhaust their peremptory challenges, either as to the first 12 jurors or as to the alternate jurors.

As stated in the opinion of the Supreme Court of Ohio in this case:

"At the outset of the trial, in response to defendant's motion for change of venue, the trial court said:

'The motion for change of venue will be held in abeyance, and we will proceed at 1:15 this afternoon in an effort to determine whether or not we can secure a fair and impartial jury. If we are not able to do that, there will be no question in this court's mind at all but what this case ought to go out of Cuyahoga County, whatever may be the effect of that.'

"At the conclusion of the impaneling of 12 jurors, the motion for change of venue was renewed (for the third time), at which time, in overruling the motion, the trial court said:

'That the best evidence in the world is the effort to select a jury, and what we get here in a picture that has taken almost two weeks of time. The court is thoroughly satisfied that we have here a fair and impartial group of people to try this case, and I doubt if under any conditions at any time anywhere in this state you could have a better looking group of people and a more intelligent group of people,

as a whole, to try a case of this kind, and the court is thoroughly satisfied that they are a group of fair and impartial people who can properly try this case under the guidance of the court, and I hope we will be able to give them that in the manner that it ought to be given.'

"The same motion, advanced for the same reason, was renewed on five other occasions during the trial, and the trial court in each instance overruled the motion.

"We believe the trial court was justified in those rulings. In Townsend v. State, 17 C. C. (N. S.), 380, 25 C. D. 408, affirmed without written opinion in 88 Ohio St. 584, 106 N. E. 1083, it is said:

'The examination of jurors on their voir dire affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue.'

"For example, in Richards v. State, 43 Ohio App. 212, 183 N. E. 36, it was held that the exercise of the right to order a change of venue lies in the trial court's discretion, and that a refusal to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled is not an abuse of discretion. See also, Dorger v. State, 40 Ohio App. 415, 179 N. E. 143; State v. Stemen, 90 Ohio App. 309, 106 N. E. (2d) 662; State v. Deem, 154 Ohio St. 576, 97 N. E. (2d) 13.

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and

without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this Court cannot say that the denial of a change of venue by the trial judge constituted an abuse of discretion." (Pet. App. pp. 87a-89a.)

The process of impaneling the jury demonstrated the wisdom of the foregoing rules and there was no unusual difficulty in securing a fair and impartial jury. The analysis of this process is briefly stated in the opinion of the Court of Appeals as follows:

"The record in this case discloses that a special venire was called for the trial of this defendant as provided by Sec. 2945.18 R. C. Seventy-five names were drawn from the jury box. Of this number, 11 were immediately excused for justifiable reasons or were not found, and counld not be summoned (three in number) by the sheriff. Of the remaining 64, 13 were excused because they had formed a firm opinion as to the guilt or innocence of the accused and 10 were likewise excused because they were opposed to capital punishment. Sixteen others were excused for cause.

"The State used four peremptory challenges and the defendant five. As is provided in Sec. 2945.21 the State in a homicide case where there is but one defendant, is entitled to six such peremptory challenges and the defendant a like number so that when the jury was sworn, the defendant left the right to one peremptory challenge unused. From the foregoing

analysis of the venire of 75 electors called in this case, four of those called were not needed in impaneling a jury of 12. Such jury was selected as provided by law and sworn and accepted by the defendant to well and truly try and true deliverance make between the State and the defendant.

"The parties agreed to select two alternate jurors as provided by Sec. 2313.37 R. C. The four remaining jurors of the original list, together with an additional venire of 24 summoned as provided by law, were used for this purpose. Of the 24 summoned, eight were called and questioned together with the four from the original venire, in impaneling the two alternate jurors. Of those examined, three were excused for holding a firm opinion of the guilt or innocence of the accused, four were excused as being against capital punishment, one was excused on challenge for cause and each side used one peremptory challenge. (Each side had the right to excuse two prospective alternate jurors peremptorily under the provisions of Sec. 2313.37 R. C.)

"The analysis of the impaneling of the jury in this case where but 16 prospective jurors out of 72 examined could not sit because they had prejudged the guilt or innocence of the accused, clearly shows that there was no difficulty whatever in impaneling a fair and impartial jury.

"The jury having been impaneled as provided by law and sworn to afford the defendant a fair and impartial trial, and to come to its verdict by a consideration of the evidence submitted in open court without any outside influence or consideration, and where there is no claim of misconduct on the part of any member of such jury during the trial, there can be no ground to claim a mistrial because of continued publicity, publicizing the events of the trial, and other related matters." (Pet. App. pp. 34a-36a.)

In their discussion on publicity and the fact that a number of jurors had read about the case before their voir dire examination, Juror Barrish is mentioned (Pet. Br. p. 35) together with the reason he gave for having read about the case.

The further extended examination of Juror Barrish by both parties is omitted from the petition and the defense omit to state that they accepted Juror Barrish by passing him for cause (R. 115) and that they had peremptory challenges which they chose not to exercise.

The fact that prospective jurors had read something about the case before they were sworn as jurors did not necessarily disqualify them. We know of no principle of law which excludes such jurors from service merely because they had previously read or heard something about the case. The persons who could hear the evidence without bias or prejudice and could decide the issues fairly and impartially were seated. Those who could not, were excused.

The defense try to make capital out of the efforts to solve this murder, especially in the weeks following July 4th. Naturally, the public authorities would check out every tip, good or bad. The same may be said for the newspapers, and if the petitioner and his lawyers pursued a course of conduct that was not in accord with protestations of innocence, comment by newspapers and others was inevitable.

The mere suggestion that the petitioner, who was protesting his innocence, submit himself to certain tests (Pet. Br. pp. 22, 23) deprived him of no constitutional right nor prevented him from having a fair trial. He was not forced to take any test and he did not submit to any test. Also discussed by petitioner under the subject mat-

ter of publicity is the evidence received with respect to the conversations had with the petitioner on the question of the lie detector test.

When the subject of the lie detector was first presented in the questioning of Officer Schottke and he related the conversation he had had with the petitioner pertaining to the lie detector, no objection was made to the admission of those conversations (R. 3590).

The trial court instructed the jury that a person is not compelled to take a lie detector test (R. 3852). The petitioner himself on direct examination in response to questions asked by his counsel, Mr. Corrigan, related his conversations with Officers Schottke and Gareau pertaining to the lie detector test (R. 6298-6299).

In the argument to the jury, defense counsel said:

> "And then during the course of that conversation he (Officer Schottke) says, 'Are you willing to take a lie detector test?'
>
> "And what was the answer that this man gave? He says, 'I am.'" (Record, pp. 5376-77.)*

Such a claim in the argument was, of course, wholly unjustified in the light of the testimony of Officer Schottke and Deputy Sheriff Rossbach, who were continually put off by the petitioner and the petitioner never did take the test. The statement of petitioner in the brief that there was objection to these conversations is entirely untrue (R. 3590).

The police and other public authorities are severely criticized for trying to obtain a "confession" from the petitioner. (Pet. Br. pp. 29-31.) What is unconstitutional about the police endeavoring to secure a confession? No

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* Typewritten Record. Original Bill of Exceptions filed in Washington.

one laid a hand on the petitioner and the most that can be claimed is that some officer used some bad words.

Much is made of the use of the words "third degree" in a newspaper editorial, but it should be remembered that that expression is frequently applied to a thorough interrogation and does not at all necessarily mean the use of force or violence. In any event, there was no force or violence used. Defense counsel must have been fearful that a confession might have been obtained. How else can they explain the extraordinary effort they made to prevent the petitioner from being interrogated except by friendly officers under stipulated conditions? How else can they explain their "sit down strike" in the county jail on Sunday, August 1st, 1954, when counsel appeared at approximately 8:15 o'clock in the morning and, by alternating one with the other, remained with the petitioner until afternoon, to prevent the interrogation of their client by the officers who were obliged to cool their heels downstairs during the entire period of time? And when the sheriff, noting that counsel was merely reading a newspaper, requested the attorneys to leave, the defense bitterly assailed him, charging him with violations of law and of the constitution. They even saw fit to make charges against the sheriff to the Bar Association and at a subsequent hearing thereon before the bar committee, counsel who made the charge did not even extend to them the courtesy of an appearance.

We should also note that later that same Sunday, after some police officers had futilely interrogated the petitioner, they were asked to leave by the sheriff in order that he be revisited by Messrs. Corrigan and Petersilge. The officers got nowhere in trying to question the petitioner and no confession was obtained. So what point is there in dwelling upon the subject matter of "confession"?

The defense also dwell on newspaper editorials critical of the progress that was being made in the solution of this horrible crime (Pet. Br. p. 24). It must be remembered that the Mayor of Bay Village was a close personal friend of the defendant, as were the police officers in Bay Village for whom he was the police surgeon; that he was whisked off to Bay View Hospital by his brothers without permission before the Coroner or any of the Cleveland police officers arrived; that a protective shield was thrown around him and that the defendant and his counsel would permit no interrogation except under their own terms and by designated friendly officers; and that the defendant and his counsel were obstructing the public authorities in what should be the normal investigation of a murder. It seemed, at least to the newspaper editors, that certain public officials were "sitting on their hands" and were fearful, for one reason or another, of proceeding vigorously in the investigation as they would in any other case. Certainly, these newspapers have a right to criticize what they deem to be laxity on the part of public officials. It is a right given them by the same constitution which assures the defendant a fair trial by jury. Whether we or defense counsel agree or disagree with the opinions expressed by the newspaper editors is entirely beside the point.

The defense refer to the inquest held in the school auditorium in Bay Village and again proceed to distort the nature of the proceedings and what occurred (Pet. Br. pp. 24-26). Ignored entirely is the testimony of Dr. Gerber that he had made arrangements for the inquest and had actually issued subpoenas before the Press editorial appeared, and that the reason it was held in Bay Village was that most of the witnesses lived there and it would be convenient for them. Also untold is the fact that the hearing

was in perfect order during the testimony of the petitioner, his parents, his brothers, the doctors, Don Ahern and Nancy Ahern, Mayor and Mrs. Houk and the Bay Village officers. There was no disorder until the last few minutes of the last day of the public hearing when Dorothy Sheppard was recalled to testify further. It was brought about by Mr. Corrigan, counsel for petitioner, who sought to direct the reporter to insert certain matter into the record. Mr. Corrigan was told not to do so and was cautioned that if he persisted, he would be asked to leave. He not only persisted, but ordered the reporter to make the insertions in the record, refused to desist when so requested, refused to sit down when so requested and challenged the authority of the Coroner to put him out. The Coroner had no alternative and was obliged to have Mr. Corrigan removed from the hearing room. This occurred within a few minutes before the close of the hearing. Furthermore, the inquest was held on July 22nd, 23rd and 26th and there was at that time no indictment of the petitioner. The indictment came later, and the trial did not start until October 18th. The disturbance at the inquest which Mr. Corrigan created has no possible bearing on the trial of this case, nor did it prevent the defendant from having a fair trial.

The petitioner states that he was taken from the jail and subjected to personal indignities (Pet. Br. p. 31). This is completely without foundation in fact. The defendant had complained of injuries and he was taken to the Cleveland City Hospital where he was given a complete and thorough physical examination. Nowhere in the testimony of the petitioner himself does he assert that he was abused by the doctors. The procedure of "pricking a patient with a pin" is merely to test the patient's reflexes and there is nothing abusive in this practice, so commonly used.

The petitioner dwells on various matters (Pet. Br. pp. 32, 34) preliminary to this trial, including his own applications for writs of prohibition, habeas corpus, etc., all of which have no bearing whatever on the trial of this cause.

On page 34 of the petitioner's brief, it is asserted that the indictment was the result of pressure on the Grand Jury. This statement is based solely on an expression of the foreman, Mr. Winston, that "pressure on us has been enormous." The complete answer of the foreman explaining the "pressure" was as follows:

> "Q. What was the pressure that was placed on you?
>
> A. *Only curious people who wanted to know what we knew on the Grand Jury.*" (Emphasis ours.)

The pressure was for information and not, as suggested by defense counsel, to indict the petitioner.

Complaint is made (Pet. Br., pp. 40-41) relative to the part taken by the Trial Court in a Fabian television program on the steps of the Court House. The trial judge, on one morning, walked toward the Court House steps as usual, and there saw Robert Fabian (a retired Superintendent of Scotland Yard) with a very small contraption in his hand. Mr. Fabian said, "Good morning, Judge Blythin, nice morning." The judge said, "Good morning, Mr. Fabian." (Pet. App., pp. 13a-14a.) There was no conversation of any kind about the case on trial or any other subject.

At pages 41-42 of the petition, the defense recount the incident of a newspaper reporter visiting the home of Lois Mancini, an interview with Mrs. Mancini's mother, husband and children, and of the pictures taken of the members of the family, together with a story of the difficulties of the family while the mother was serving on the

jury. There may be some question as to the good taste of such a story, but in any event it did not favor one side or the other and was entirely without prejudice to the defendant. Furthermore, Lois Mancini was not present during the visit of the reporter and did not participate in the interview. We wish to also note that she was merely an alternate juror and did not participate in the deliberations or the verdict.

It is urged that during the trial there was a broadcast by Walter Winchell (Pet. Br. p. 42), in which he related the story of a woman in New York who claimed she had been a mistress of Sam Sheppard. At the request of defense counsel the court inquired of the jurors whether they had heard this Winchell broadcast and two jurors responded that they had. The jurors had no knowledge that Mr. Winchell was to broadcast anything at all pertaining to the Sheppard case or to Sam Sheppard. The two jurors who heard the broadcast were asked by the Court: "Would that have any effect on your judgment?" Both answered, "No." The Court stated:

> "I do hope, ladies—I would like to ask if any of you know if any members of your families heard the broadcast?
>
> "Have any of you, other than these two ladies, heard anything about that broadcast last night? And I wish to ask you two ladies in particular, and all of you in general, to pay no attention whatever to that kind of scavenging. It has no place, in my judgment, on the air at all, but that is not for me to determine, but surely it has no place whatever in our thinking or considerations or thoughts in any way, shape or manner in this case. *Let's confine ourselves to this court room, if you please.*" (R. 5429-30.)

Urged for the first time in the Supreme Court of Ohio as error was the refusal of the trial court on motion for

continuance in the 5th week of trial to ask the jurors if they heard a broadcast by Bob Considine over Station WHK in which there was something said about the testimony in the Sheppard case (Pet. Br. p. 41). This matter was brought up in the court's chambers and neither the court nor the prosecutors had any knowledge whatsoever of the alleged broadcast. Mr. Corrigan, counsel for the petitioner, complained that Bob Considine had paralleled a denial of the petitioner as set forth by Officer Schottke with a denial of Alger Hiss when he was confronted by Whittaker Chambers, without stating that Dr. Sheppard was in bed in the hospital at the time of his denial, while Mr. Hiss was strong, mentally and physically.

Apart from this assertion of counsel, no proof whatever was submitted to the court as to the exact nature of the broadcast, although Mr. Considine was available, it being conceded by the defense that he was in daily attendance at the trial. When the court stated: "We are not going to harass the jury every morning," Mr. Corrigan then responded, "I can't help it, Judge. If you don't, that's all right with me. I make my exception." (R. 3725.)

Upon the hearing on the motion for new trial and even though several of the jurors had been subpoenaed, the defense produced not a word of testimony to support their present claim that the jurors heard this broadcast. There is in the record not one particle of evidence that any of the jurors were influenced by this broadcast or the so-called Winchell broadcast or by anything else other than the evidence produced in open court.

That it was not error for the court to refuse to interrogate or poll the jurors during the trial as to whether they had read a newspaper article or heard a radio broadcast such as the Considine broadcast, is affirmed by the annotation in 15 *A. L. R.* (2) 1152, wherein it is stated:

"The present annotation is concerned with the question of whether, during a criminal trial, the jurors may be interrogated or polled as to whether they have read newspaper articles pertaining to the alleged crime or the trial. As the title indicates, the annotation involves the propriety of interrogation or polling after impanelment, as distinguished from that which occurs on voir dire examination.

"The few cases that involve this specific point all uphold the trial court where it refuses to interrogate, or refuses to let a party interrogate, the jurors as to the reading of newspaper articles relating to the trial or the crime. The decisions generally turn on the fact that the trial court had instructed the jury not to read the articles or that there had been no showing by the moving party that the jurors had in fact read them."

Complaint is made that the jurors were photographed on several occasions and "during deliberations" (Pet. Br., p. 44). It is, of course, not the fact that they were photographed during deliberations.

On the motion for new trial, the trial court stated:

"Jurors were flash-photographed in their comings and goings and it is difficult to know how that can be prevented even if, indeed, it should be. Jurors are human beings and become citizens of special importance when undertaking a signal public service. Not a single complaint was registered by any juror in this connection and it is worthy of note that the defense does not even claim that any juror was affected in the least by it. Furthermore, they were not flashed by agents of the State nor on its behalf. Such exposures to public attention are not matters of prejudice for or against either the State or defendant but matters of news interest to newspapers. They remain wholly neutral if fed sufficient news or pictures of interest." (Pet. App., pp. 8a-9a.)

The Trial Court stated further on the hearing on the motion for new trial:

"While this Court would not for the world minimize the importance of guarding this jury—or the jury in any other case—from annoyance or influence, he must express the thought that human beings, whether serving as jurors or not, cannot be wrapped in cellophane and deposited in a cooler during trial and deliberation.

"The jury in the instant case was jealously guarded throughout the entire proceedings and it is worthy of note—and indeed decisive in this Court's judgment, that not a suggestion of influence upon the jury is forthcoming from any person or agency. Interference or influence must be the test. If we are to convict jurors without a scintilla of evidence of undue influence on them, it is now pertinent to halt and ask ourselves what becomes of our faith in our decent fellow-citizens and of what value is the jury system at all.

"It is claimed that the jurors were permitted to separate on one or two occasions within the period of their deliberations and were so photographed. Foreman Bird and Bailiff Francis testified that the so-called separation of jurors was merely their momentary division in the dining room of the hotel for the purpose of photographing the men in one group and the women in the other. It was in the presence of the two bailiffs, was only a few feet in extent and there was no communication of any kind with the jury by the photographer. To term such a petty detail a 'separation' is stretching the imagination to a dangerous point. It certainly is not the separation prohibited by law and is hardly worthy of serious thought or comment.

"The Court had complete confidence in the jury in this case; it was protected at all times from any pos-

> sible approach, and its every movement and conduct would seem to be an eloquent demonstration of the fact that it proved itself worthy of the confidence placed in it to faithfully carry out the admittedly tremendous responsibilities entrusted to it." (Pet. App. 12a-13a.)

Much is made at pages 45-46 of the petitioner's brief of "Disorder During the Trial." Counsel complains that there were instances of disorder, noise and laughter in the court room. It should be remembered that this trial continued for some nine weeks and that necessarily there are times when people are required, for one reason or another, to leave the court room. A few of these occurrences caused the Court to admonish the spectators to the end that there be no interruption of the trial proceedings. There are, of course, the inevitable traffic noises on East 21st Street in Cleveland which result in short delays or repetition of the questions.

As to the incident of the laughter to which Mr. Corrigan refers (Pet. Br., p. 46), it resulted from Mr. Corrigan's remark, "Well, I don't care what the conversation was," after he had asked the witness what the substance of a conversation was, and the witness had given his answer.

Counsel complains of the presence and conduct of unnamed persons in and about the court room and corridors during the five days in which the jury was deliberating in their jury room (Pet. Br., p. 49). If the unnamed persons interested in the outcome of the trial, whether they be newspaper men, counsel for the defendant, the defendant's brothers, Dr. Steve Sheppard and Dr. Richard Sheppard, their respective wives and friends or other spectators, milled around during the five days, or if some of them played cards during the long wait, we fail to see

how that in any way influenced the jury in its deliberations or had any bearing on the verdict. There is not a scintilla of evidence in the record that the jury was disturbed or influenced by any of the activities in the court room or in the corridors while they were in their jury room during their deliberations.

Petitioner has presented nothing by way of affirmative evidence to show that the court or jury had been improperly influenced by publicity or anything else. The burden is upon them to do so. Section 2945.83 of the Revised Code of Ohio, governing the state courts on review, provides:

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> * * *
>
> "(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;
>
> * * *
>
> "(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

This rule in Ohio is in conformity with the ruling of this Court as expressed in *United States v. Handy,* 351 U. S. 454:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'

> "See also, Adams v. United States, 317 U. S. 269, 281, 87 L. Ed. 268, 276, 63 S. Ct. 236, 143 ALR 435; Buchalter v. New York, 319 U. S. 427, 431, 87 L. Ed. 1492, 1496, 63 S. Ct. 1129; Stroble v. California, 343 U. S. 181, 198, 96 L. Ed. 872, 885, 72 S. Ct. 599."

This Court pointed out in the *Handy* case that Justice Holmes, speaking for a unanimous Court in *Holt v. United States*, 218 U. S. 245, 251, 54 L. Ed. 1021, 1029, 31 S. Ct. 2, 20 Ann. Cas. 1138, cautioned that:

> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

OTHER MATTERS SET FORTH IN APPLICATION OF PETITIONER DID NOT DEPRIVE HIM OF DUE PROCESS OF LAW, NOR, WHEN THE FACTS AND PROCEEDINGS ARE CORRECTLY STATED, WAS THERE ANY ERROR IN THE RULINGS OF THE COURT.

III.

As to Juror Manning (Pet. Br. pp. 50-52) and his replacement by the alternate juror.

After Juror Manning was seated and sworn as a juror, a young man came to the Criminal Courts Building, talked to counsel for the defendant first and later to the Prosecutor, and informed them that Juror Manning had been arrested and convicted of a morals offense relating to a young man. The matter was also brought to the attention of the Court. Manning neglected to make this conviction known when he was asked on the voir dire examination whether or not he had ever appeared as a witness in any case. The matter became known generally and received considerable publicity. A meeting was held in chambers and by common consent the matter was continued over

the weekend. Counsel for the defense thereafter proposed that he would consent to the discharge of Juror Manning if the entire panel was discharged and we would proceed to re-impanel the jury. This proposal was declined by the State.

After the alternate jurors were impaneled, Juror Manning addressed himself to the Court in open court and stated:

> "Juror Manning: Right now, I mean from what is going on, when I came down here for jury duty I thought I was doing what a public spirited citizen of this country would do. That's the only idea I had when I came down. It interfered with my work, my earning a living. I didn't give a second thought to that. I came down here, and if I was chosen, I would serve and serve in the way I spoke, absolutely unbiasedly. And I was—I tried to run myself from the heart and mind together and be absolutely unbiased and unprejudiced in thinking and talking with other people, even speaking outside this jury. But after what has happened, I would not be able to sit in that box with the other jurors, be able to listen to the case and be unbiased, unprejudiced or—unemotional is what I am trying to drive at mostly; that if this keeps up, if I am kept on the jury, I think I will be a subheadline as long as the trial goes on. I will definitely have a nervous breakdown in a very short time and, in fact, I feel I am just about ready for one right now." (R. 1600-1601)

The Trial Court excused Juror Manning on the ground that he was both disabled and disqualified.

Revised Code Section 2945.29 (13443-13) provides:

> "Jurors becoming unable to perform duties. If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the

> Court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the Court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled."

Revised Code Section 2313.37 (11419-47) provides in part:

> "If before the final submission of the case to the jury a juror becomes incapacitated or disqualified, he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror."

The defense contend that they had one challenge left when Juror Manning was excused and his place taken by alternate Juror Hanson (Pet. Br., p. 51). As the Court of Appeals stated:

> "The defendant entered his exception to the procedure used by the Court in discharging Juror Manning and demanded the right to exercise his remaining peremptory challenge when the first alternate juror was seated in the panel after Manning was discharged, which request was refused.
>
> "After a jury is sworn and charged with the delivery of the defendant, the trial is commenced and unused peremptory challenges cannot thereafter be used and where an alternate juror has been selected and sworn as provided by law, he must be seated in the place of the discharged juror by order of the Court." (Pet. App., 38a-39a)

In any event, there is here no federal question.

The prospective jurors were questioned at very great length by both counsel for the State and the defense, and the Court. In fact, there are three volumes of the Bill of Exceptions, totaling hundreds of pages, setting forth such detailed examination. Except for Juror Manning who was discharged, the 13 jurors who sat and heard this case, and the 12 jurors who decided this case, were all competent and qualified jurors, without prejudice or bias, and the record discloses that they gave most careful and adequate consideration to the case.

IV.

Conduct of the bailiffs in permitting jurors to telephone members of their families between deliberations (Pet. Br., pp. 52-54).

We wish to point out, at the outset, that the matters complained of took place in the hotel room when some of the jurors called their husbands or children on the telephone, and not in the jury room during the deliberations (Petitioner's Brief, pp. 52-53). The jurors deliberated in a room above the court room in the Criminal Courts Building and there is absolutely no evidence in the record showing any misconduct of the jury or of the officers in charge.

The telephone calls to the husbands and children of the jurors, all made in the presence of the bailiff, were not made during the deliberations of the jury. They were made from the hotel room to which they had been taken from the jury room and there is no evidence whatsoever that the case was even discussed in these telephone calls, much less anything said prejudicial to the petitioner.

There is no evidence whatsoever of telephone conversations with strangers, as suggested in the brief of the petitioner. The testimony of Bailiff Edgar Francis follows:

"Q. Do you know, of your own knowledge, whether there was any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?

A. Their phones were cut out, Mr. Garmone.

Q. By whose request?

A. Mr. Steenstra arranged that.

Q. And were there any telephone calls made from the room that you occupied?

A. Yes, sir.

Q. Did you make the calls, or did the jury make the calls?

A. No. The jury made the calls, and I sat in the chair right alongside the telephone.

* * *

Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * *

A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

Q. Was there any conversation whatsoever about this case or their deliberations?

A. Not one word, Mr. Parrino." (R. 7084-7085.)

The defense saw fit to call certain jurors to the witness stand on their motion for new trial and if they wished to pursue this matter further, they had the right and opportunity so to do. They chose not to do so and there is nothing in the record whatever of anything having been said or done either by the bailiffs or by or to the jurors prejudicial to the defendant.

The trial court stated when a supplemental motion for new trial was filed:

"The court named Simon Steenstra, permanent criminal jury bailiff and Edgar Francis his own courtroom bailiff as the persons to have charge of the jury

in their movements during the period of deliberation. They were named in open court in the presence of all interested parties. Both were well known to all parties, with the possible exception of defendant, and not a word of objection was voiced by anyone. Furthermore, one of counsel for the defense saw the court in chambers prior to the selection of said bailiffs and inquired of the court who he intended to appoint to take charge of the jury during the deliberation period. Upon being informed that the court would name Bailiffs Steenstra and Francis he expressed his whole-hearted approval." (Pet. App., pp. 16a-17a).

The Supreme Court of Ohio in the opinion states:

"Defendant contends that he was prejudiced in this case by the actions of two officers of the court, in whose charge the jury was committed during its deliberations, in permitting some members of the jury to make unmonitored telephone calls in violation of Section 2945.33, Revised Code, which reads as follows:

> 'When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. * * *'

"It is conceded that no authorization for such telephone calls was given by the court.

"At the conclusion of each day's deliberation, the members of this jury were housed in the Carter Hotel, under the supervision of two court bailiffs. The record reveals that the telephones in the hotel rooms occupied by individual jurors had been 'cut

out.' However, some of them were permitted to make calls on the telephone in the room of one of the bailiffs.

"In connection with a motion for a new trial, the record discloses the following cross-examination of one of the bailiffs by counsel for defendant:

'Q. Did you make the calls, or did the jury make the calls?

A. No. The jury made the calls, and I sat in the chair right alongside the telephone.'

"On redirect examination, the testimony was as follows:

'Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * *

A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

Q. Was there any conversation whatsoever about this case or their deliberations?

A. Not one word, Mr. Parrino.'

"Counsel for defendant rely upon State v. Adams, 141 Ohio St., 423, 48 N. E. (2d) 861, 146 A. L. R. 509, as authority for their contention that the action of the bailiff in permitting these telephone calls constituted error prejudicial to the defendant. They cite the third paragraph of the syllabus of that case, which reads:

'The violation by a court officer in charge of a jury of Section 13448-1, General Code (Section 2945.33, Revised Code), to the effect that he shall not communicate with a jury in his charge or custody except to inquire whether it has reached a verdict, will be presumed to be prejudicial to a defendant against whom, after such communication, a verdict is returned by such jury.'

"A mere reading of the following fourth paragraph

of the syllabus of the Adams case should be sufficient to distinguish that case from the present one:

> 'Where a court bailiff, on being informed by the jury during its deliberations that it could not agree, stated to it: 'You can't do that. You must reach a decision if you have to stay here for three months,' there is a violation of the statute which is prejudicial to a defendant against whom, following such declaration, a verdict is returned by the jury.'

"The case of Emmert v. State, 127 Ohio St., 235, 187 N. E. 862, 90 A. L. R. 242, although not cited by defendant, might also be authority for the proposition that misconduct of a bailiff is ground for reversal. That case, however, is also readily distinguishable from the present one. In the Emmert case the officer in charge of the jury, at a time when it was not actually in its deliberative sessions, said to certain members of the jury: 'My God, you are all wet. Judge Stahl expects you to return a verdict of guilty and if you don't it will be just too bad.' Other remarks of a similar nature to the effect that the jury had to reach a verdict were made by the bailiff.

"In situations such as those in the Adams and Emmert cases, it is easy to presume prejudice to the defendant as a result of the conduct of the bailiff. Can the same be said of the conduct of the bailiffs here in permitting jurors, who for several days and nights had been sequestered and unable to see or hear from their husbands, wives or children, to telephone those members of their families? We do not think so. There is, on the contrary, every reason to believe that assurances of the health and welfare of their loved ones would tend to ease the jurors' minds as to personal matters and would make them better, more conscientious jurors. Time after time, the members of this jury were instructed by the court not to communicate with anyone concerning this case or permit anyone to

communicate with them about it. We must assume they followed the court's instructions. No complaint is made that they disregarded these instructions every night for some seven weeks that they were allowed to go home at the close of each day's session of the trial. It is difficult to visualize a juror who will follow a court's instruction during the many hours he spends each evening and week end with his family and then deliberately disregard that instruction in a few brief moments he speaks to a member of his family on the telephone in the presence of a bailiff.

"The law in Ohio is that no judgment of conviction shall be reversed in any court for any cause unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. Section 2945.83, Revised Code. There is no such affirmative showing of prejudice here, and this Court will not presume a prejudice as a matter of law from the fact that some of the jurors made telephone calls to members of their immediate families." (Pet. App., pp. 89a-92a.)

V.

On the claim that the authorities seized the home of the petitioner (Pet. Br., pp. 54-56).

The defense make reference to matters concerning the possession of the home (Pet. Br., pp. 55, 62) which they made an issue on the motion for new trial on the ground of newly discovered evidence, which motion was denied by the trial court, affirmed by the Court of Appeals of Cuyahoga County in 100 Ohio Appeals 399 and dismissed on appeal by the Supreme Court of Ohio in 164 O. St. 428. No appeal has been taken from the final action of the Supreme Court of Ohio and the judgment of our State courts thereon is now final. Notwithstanding the

finality of this judgment, the defense again drag into their petition for a writ of certiorari the unfounded claim that they were prevented from examining the premises. The Court of Appeals, in a well reasoned and extended opinion, have completely answered this claim in 100 Ohio Appeals at pages 406-407:

> "During the trial the defendant subpoenaed the keys into court through Chief Eaton and demanded the right to retain them. The trial judge, however, ruled that they must remain in the possession of the police of Bay Village, which order was carried out until December 23, 1954, when complete possession of the house was given the defendant. *There is no evidence that any request to enter the house for the purpose of investigation and inspection was ever made by the defendant, nor does the record show any formal application to the court at any time for a like purpose.* Dr. A. J. Kazlauckas, a physician and expert who had spent many years as a deputy coroner of Cuyahoga County, was in the employ of the defendant. He examined all the articles of property pertaining to this case in the possession of the county coroner, together with the autopsy report, conclusions of laboratory findings and X-rays of Marilyn Sheppard, and yet made no effort to make any scientific examination of the premises. He was not even presented as a witness during the trial. Assistant Prosecuting Attorney Saul S. Danaceau deposes in his affidavit that he informed Arthur E. Petersilge, of counsel for the defendant, and the brother of the defendant, Dr. Stephen Sheppard, in early November, 'that the said house was available to the defendant at any and all times to inspect or conduct investigations therein.' It seems, however, that it was understood that on all occasions a police officer would have to accompany the defendant or any representative of his when visiting the home."

The record of this case shows the extreme importance of numerous articles of property within the home and a number of such articles appear as exhibits in the evidence. It was also necessary to continue the examination and search in and about the house for possible clews and particularly for the still missing T-shirt and weapon. The record will disclose the continuous examination of the premises for blood spots, fingerprints, etc., by the scientific unit of the Cleveland Police Department and by members of the staff of the county coroner. As stated by the trial court, the prosecutor "could very well have been subject to just criticism" had he directed Chief Eaton to act otherwise.

Further complaint is made that the Court erred in not ordering the keys to the house turned over to Mr. Corrigan during the testimony of Chief Eaton. This episode occurred during the closing days of the trial when a subpoena was issued to Chief Eaton, requesting the Chief to bring with him the keys to the house. As a matter of fact, the defendant, counsel for the defense, and the members of the defendant's family had never been denied an opportunity to enter the premises or any part thereof, or to make an examination or investigation therein. Also, as a matter of fact, the defendant, counsel, and defendant's family had visited the premises and at no time had they been denied access thereto.

The cross examination of Chief Eaton at that time, by Mr. Mahon, was as follows:

> "Q. Chief, since you have had that key—you got it some time in November, the key to the house; is that right?
>
> A. Yes, sir.
>
> Q. From that time down to date has the house been accessible to the Sheppard family?

A. Yes, it has.

Q. And have they been in the house during that period of time?

A. Once, on one occasion, at least.

Q. To take care of the heat, and so forth, and water, and all of those things?

A. Yes.

Q. Is that right?

A. Yes.

Q. Have they ever been denied at any time the right to go into that house since you have had possession of the keys?

A. They have not." (R. 6076.)

"By Mr. Corrigan:

Q. And the order that Sam Sheppard could not go into his home, where did that come from?

A. Pardon me. Will you repeat that?

Mr. Danaceau: We object to that. We know of no such order.

Q. Did you make that order?

Mr. Danaceau: Just a minute.

Mr. Mahon: Was there such an order?

The Court: Let him tell what the situation was.

Mr. Mahon: There is no evidence there ever was such an order.

The Court: No, there isn't any evidence about an order, but he is the Chief of Police. Let him answer if there was.

A. I didn't understand the question, I'm sorry.

The Court: Will you restate your question, Mr. Corrigan? The Chief doesn't understand it. Or let the reporter repeat it.

(Question read by the reporter.)

A. There was no order he could not go in his home.

Q. The order that Sam Sheppard could not go into his home except in the custody of a policeman or with a policeman, how did that originate?

A. That was suggested, I believe, by the prosecutor's office." (R. 6077-6078.)

Obviously, the whole episode in the closing days of the trial, and the demand for the keys in the presence of the jury was a grandstand play and show, and nothing else.

In the meantime, the defendant and his counsel had, on more than one occasion, visited the home and, as previously pointed out, went through all the rooms and examined the house, both inside and outside. The defendant was permitted to remove his medical bags and the contents. He and the members of his family were also permitted to remove his clothing, Chip's clothing, and various other articles. Also removed were his automobiles, consisting of a Jaguar, a Lincoln Continental and a jeep. Except for the Lincoln Continental, all of these articles of property were removed within a week or two following the murder of Marilyn Sheppard and became unavailable for further examination by the scientific unit of the Cleveland Police Department when, at a later date, the case was turned over to them for further investigation. Also made available to the defense for their inspection were all of the articles in the possession of the county coroner and such articles were examined by Fred Garmone, counsel for the defense, and by Dr. Anthony J. Kazlauckas, a former deputy coroner of the county, on behalf of the defense (100 Ohio Appeals p. 403).

In the words of the trial court (Opinion overruling motion for new trial on newly discovered evidence):

"Seldom indeed does the entire interior of a home become as important as the interior of this home seemed to be in the period in question and while complete

exclusion of the representatives of the defense would not be justified, it is only rational to believe that the Prosecuting Attorney was fully justified in preserving the scene in status quo pending trial and its outcome. The two affidavits last mentioned and the statements of all counsel in open court clearly indicate that the prosecution had no desire to conceal anything and must lead the Court to the conclusion that there existed neither concealment nor hindrance and that the condition imposed, already mentioned, was merely precautionary. It is not unlikely that failure to take possession of the property and failure to take the precaution taken could very well have been subject to just criticism."

VI.

All of the claimed violations of the petitioner's constitutional rights to a fair trial were passed upon by the Supreme Court.

In the Supreme Court of Ohio it was claimed that the petitioner was denied due process of law, but apart from quotations from "Annals of the American Academy of Political and Social Science" and several cases, nothing specific was shown wherein the petitioner was denied due process of law, in any one of the claimed errors.

The Supreme Court, in its opinion, discusses at great length the matter of publicity and the various motions for a change of venue. In its opinion at page 87a of the Appendix to the Petition, it is said:

> "It should be borne in mind, however, that the legal question presented to us is whether the defendant was accorded a fair constitutional trial by an impartial jury which could decide the issues of fact solely upon the consideration of the evidence in the light of the law given it by the court. That question is not to be decided on the volume of the publicity or the

tendency such publicity may have had in influencing the public mind generally as to the defendant's guilt or innocence."

After further discussion, the Supreme Court in its opinion at page 88a of the Appendix continues:

"The same motion, advanced for the same reason, was renewed on five other occasions during the trial, and the trial court in each instance overruled the motion.

"We believe the trial court was justified in those rulings."

Continuing, the Supreme Court said at pages 88a-89a:

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this Court cannot say that the denial of a change of venue by the trial judge constituted an abuse of discretion."

Then, the Supreme Court said further, at page 94a:

"The facts were presented to 12 qualified jurors sworn to well and truly try the issues between the State of Ohio and Sam H. Sheppard. In what was obviously a careful, complete and correct charge, Judge Blythin instructed that jury as to the law applicable to those facts. In such a situation, the following words

of Mr. Justice Holmes, in Aikens v. State of Wisconsin, 195 U. S. 194, 206, 49 L. Ed. 154, 25 S. Ct. 3, are appropriate:

> 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved."

At the conclusion of its opinion, the Supreme Court said, at pp. 94a-95a:

> "We have carefully examined the other errors assigned and find none, either in the admission or rejection of evidence or in the instructions of the court, prejudicial to the defendant."

VII.

The petitioner claims that the Supreme Court of Ohio was an illegally constituted court at the time the court heard this case.

This is just another example of the numerous frivolous claims made by the defense. It was at their instance, and without informing the prosecution of their intention, that the Chief Justice disqualified himself and appointed another judge. No objection was made prior to the hearing on this case in the Supreme Court and it was not until after the court as constituted made its decision adverse to the defense, that they first raised the issue.

An analysis of Article IV, Section 2 of the Ohio Constitution (Pet. Br. p. 59) will disclose that if any of the judges shall be unable, by reason of "illness, disability or disqualification" to hear, consider and decide a cause or causes, the Chief Justice may direct a judge of the Court of Appeals to sit in the place of such judge on the Supreme Court, but that only in the case of absence or disability of the Chief Justice (not mere disqualification) is the judge having the longest period of service upon the Supreme

Court authorized to direct an appellate judge to sit. Where the Chief Justice merely disqualifies himself and is not absent or disabled, it is the Chief Justice who directs the appellate judge to sit with the judges of the Supreme Court.

The defense raised this issue on rehearing before the Supreme Court of Ohio and their application for rehearing was denied. This is purely a State constitutional question, decided by the highest court of the State of Ohio adversely to the defense and there is involved therein no Federal constitutional question.

SUMMATION.

Essentially, the petition before this Court is based on the publicity. Much of the publicity complained of occurred long before the trial took place. The trial judge was thoroughly familiar with the treatment given the murder mystery by the news media and was certainly in the best position to determine whether or not the petitioner would receive a fair trial. Much of the newspaper publicity in this case was inspired by the lack of cooperation of the petitioner with the authorities beginning immediately after the murder of his wife was committed, by the protective shield thrown around him, and by the strategy of his counsel. None of the publicity was deliberately promoted by the prosecution. To hold that publicity in and of itself is a denial of due process of law is to fetter the State in the prosecution of crime and in bringing to justice the person responsible for such crime. Any sensational murder such as this brings forth publicity, some more, some less, but in the circumstances of each case, the issue before the trial court is whether a fair and impartial jury can be obtained. The jurors who sat in the trial of this case were all thoroughly examined and

definitely stated that they would give to the defendant the benefit of the presumption of innocence. They were fully examined so far as defense counsel desired as to any knowledge or information they might have of the case. At no stage of the proceedings did the petitioner offer any evidence to prove that any juror was in fact prejudiced by the publicity, and, moreover, a period of two months and a half intervened between the day of the petitioner's arrest and the beginning of the trial.

The presumption is that the jurors followed the instructions of the court. A distrust of the jury without any affirmative showing that they were not to be trusted in following out the court's instructions is what counsel for the petitioner urges upon this Court.

The defense repeatedly assert that the newspapers were hostile to the petitioner and sought his conviction. Though this unsupported claim is constantly repeated and grows in vehemence each time it is so repeated, it is simply not the fact. News agencies such as newspapers and the radio were greatly interested in the case, as they would be in any similar case. The news stories and broadcasts giving their respective versions of the testimony in the case and of the other proceedings had, may not at all times have been agreeable or pleasing to either the State or the defense. Certainly, the court has no control over what the newspapers shall print or what the radio stations shall broadcast. As far as the jurors were concerned, they were repeatedly instructed to disregard all such stories and broadcasts and to decide the case solely on the basis of the evidence presented in open court and on the law given to them by the judge.

The claims of the defense that the jury and the officers in charge of the jury during its deliberations were guilty of misconduct to the prejudice of the petitioner is

based on the mere assertion and argument of counsel. There is no evidence that the petitioner was prejudiced. On the contrary, the jurors deliberated patiently, carefully and thoughtfully for a period of five days, and reached a verdict which responded to the evidence.

Petitioner has seen fit to place in the Appendix to the petition for a writ of certiorari the opinions expressed in some scattered newspaper articles that he did not have a fair trial. Surely, such opinions are not evidence in this case and should not be received as a substitute for evidence, nor as a substitute for the well-reasoned opinions of the trial and reviewing state courts based upon the record. Again, we have the situation where it is the defense and not the State that is dragging the newspapers into this case.

A complete and fair analysis of the record discloses no foundation in fact for the claims advanced for the allowance of a writ of certiorari. Nor has the state supreme court or the trial or appellate state court decided a federal question of substance not theretofore determined by this Court, nor in a way not in accord with applicable decisions of this Court.

On the record there is no real or substantial Federal question involved herein and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 352.

SAMUEL H. SHEPPARD,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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SAMUEL H. SHEPPARD,

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THE STATE OF OHIO,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Thhe Petitioner prays that this Court grant rehearing of its Order of November 13, 1956, denying the Petition for Writ of Certiorari (No. 352, October Term, decided Novemberr 13, 1956), ... U. S. ....., 25 U. S. Law Week, p. 3146, Vol. 17, C. C. H. Supreme Court Bulletin, p. 105, , and that Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Ohio in the above entitled case, as prayed for in the Petition filed Augustt 28, 1956.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

I.

The record in the Supreme Court of Ohio discloses that Petitioner's case was admitted to that court because it determined that a constitutional question was involved,

and, after admission, did not pass on the constitutional question.[1]

II.

The Separate Memorandum of Justice Frankfurter informs the Bench, the Bar and the Public that the Supreme Court of the United States refuses to pass upon the question whether a trial held in the atmosphere of a Roman Holiday for news media and in a criminal courts building equipped by the trial court for broadcasters and telecasters is a deprivation of due process of law; that a trial so conducted does not commend itself to the exercise of the discretion of at least four members of the Court.

Does it serve justice that the finding of the Supreme Court of Ohio on the conduct of a trial shall stand without review by this Court? It is stated in the Memorandum that "the denial of the petition in no way implies that this Court approves the decision of the Supreme Court of Ohio."

While the denial of the writ does not reveal the position of "all members of the court," it does reveal the position of more than a majority of the court. That majority voices neither approval nor disapproval. It is silent.

As a result, it stands as the law of Ohio, the State with nine million inhabitants, that a trial conducted in the manner that Petitioner's trial was conducted fulfills the requirement of due process of law guaranteed by the Constitution.

The Supreme Court of the United States is the most influential authority in the nation in establishing public policy and precedent.

When the Court permits the decision of the Supreme Court of Ohio to stand it has established a national policy and ruling case law that will affect trials in the future.

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[1] Petitioner's Petition for a Writ of Certiorari, p. 56.

The policy and precedent that results from the denial of the writ in this case will soon be reflected in trials all over the land, especially in cases involving sex, sensation and crimes. It will justify the acts of judges, law officers and demonstrative lawyers who covet publicity and crowd approval for their personal benefit.

Newspapers, telecasting and broadcasting companies will point to this case as the open door to the courtroom where they can enter with impunity and approval to advance the personal interests of their companies or organizations.

This Court cannot escape the fact that these medias of publicity have launched and are carrying out a well-planned campaign to televise, broadcast and photograph sensational trials.

Tremendous pressure is on to secure the nullification of Canon 35 of the Canons of Judicial Ethics.[2] Already the campaign has been successful in part and it is general knowledge that a number of judges have submitted to the pressure.

The question raised by the Petitioner and now emphasized by the Memorandum of Justice Frankfurter is of

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[2] *American Bar Journal*, Sept. 1956, Vol. 42, p. 843:

"Canon 35 of the Canons of Judicial Ethics was adopted by the House of Delegates of the American Bar Association, in 1937 and amended to include the prohibition against broadcasting in 1952. It reads in part as follows:

'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.' "

imperative interest to the Bench and Bar [3] and the Public.[4]

For more than half a century the Bar has been discussing and deploring "trial by newspaper." [5]

The Survey referred to in footnote (5) emphasizes the fact (p. 213), which should be of the utmost concern to the courts and lawyers alike, of the foothold gained by these practices, which have come to be known as "trial by newspaper." "Presumably the day will come (Survey, p. 184), when at least four Justices of the Supreme Court will agree to an adjudication of the issues involved. We can only hope that the day may come soon."

The denial of the Writ devitalizes the noble concept of Anglo-Saxon Jurisprudence that the place of justice is a hallowed place [6] and that it is basic that a trial take place in an atmosphere of quietness, dignity and detachment from the passions of the community.[7]

It is startling to speculate on the effects that will result to the right of a fair trial because of the denial of this Writ. We are constantly being warned by great voices to be on guard against the powerful forces in the world that are

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[3] *American Bar Journal*, September, 1956, Vol. 42, p. 43; *American Bar News*, Vol. 1, No. 1, July 16, 1956, p. 4.

[4] *New York Times* Editorial, September 5, 1956.

[5] *Conduct of Lawyers and Judges*, Final Report for the Survey of the Legal Profession under the Auspices of the American Bar Association, pp. 154-187. Parker & Co. Los Angeles, 1952.

[6] "Thirdly, for that which concerns clerks and ministers. The place of justice is a hallowed place; and therefore not only the bench, but the foot-pace and precincts, and purprise thereof, ought to be preserved without scandal and corruption; for certainly *grapes* (as the Scripture saith) *will not be gathered of thorns or thistles* neither can justice yield her fruit with sweetness amongst the brars and brambles of catching and polling clerks and ministers." Francis Bacon, "*Of Judicature*," Essay No. 56—1654.

[7] "*We The Judges*," p. 361, by Justice William O. Douglas.

working to extinguish liberty. We know that the right of a fair trial has been blotted out in most of the world.[8]

CONCLUSION.

For the reasons set forth above and in the Petition for Writ of Certiorari it is respectfully urged that rehearing be granted and that upon such rehearing a Writ of Certiorari issue to the Supreme Court of the State of Ohio.

Respectfully submitted,

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[8] "Such times call for constant reflection and re-appraisal, in order to determine what our heritage of liberty is and what we are doing today to preserve it for our children and for those who come after them. * * * It is easier to know how to combat a foreign enemy who challenges our right to these freedoms and thus prevent a sudden collapse of the things we hold dear than it is to subject ourselves to daily analysis and discipline for the purpose of preventing the erosion that can with equal effectiveness destroy them." Chief Justice Earl Warren, *Washington University Law Quarterly*, April, 1955.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

WILLIAM J. CORRIGAN,
Counsel for Petitioner.